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# REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

DECEMBER TERM, 1877.

BY

JOHN W. SHEPHERD,

SPECIAL REPORTER.

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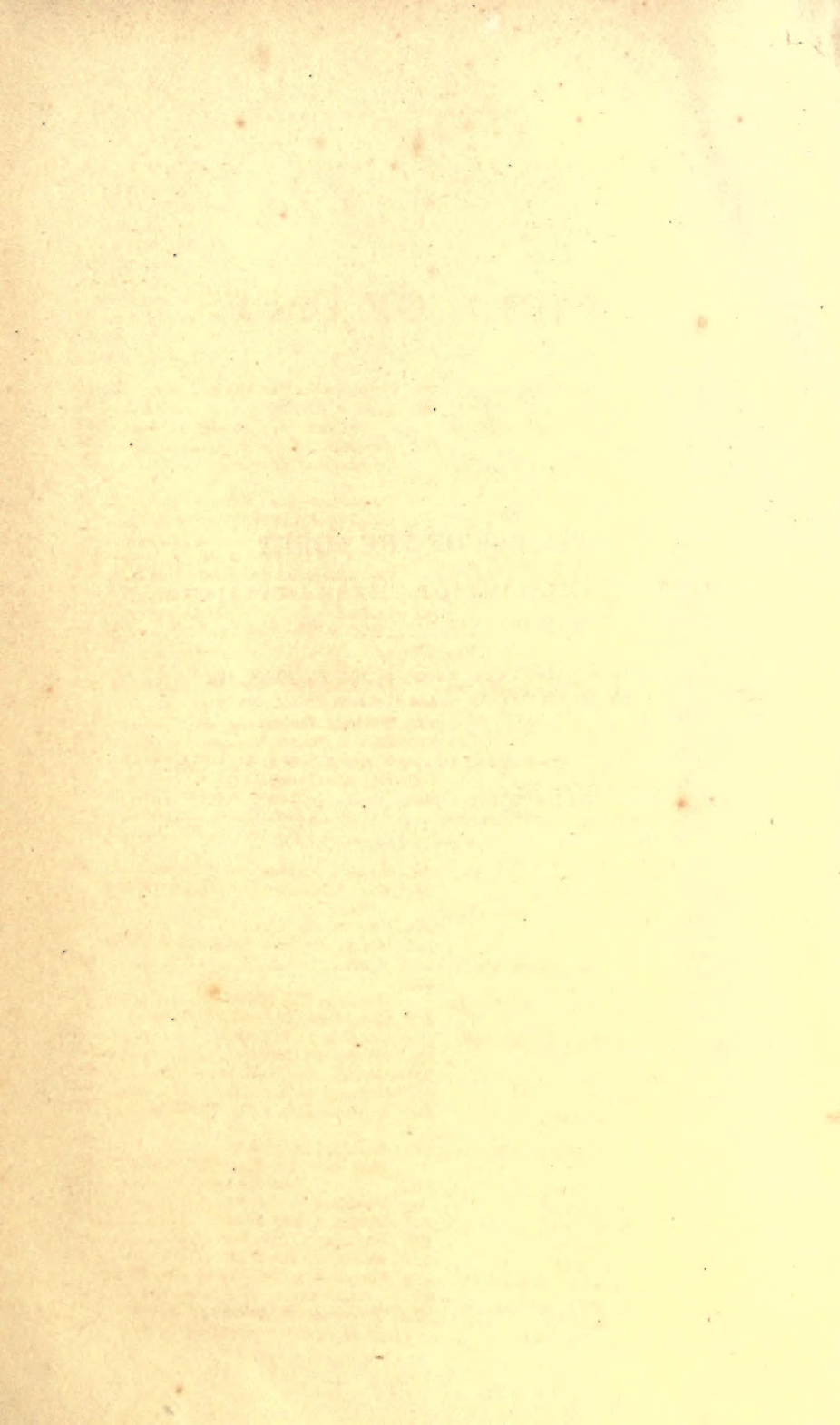
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## ERRATUM.

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In *Walker v. Griffith*, p. 366, 9th line from bottom, for "*poured over*," read "*pored over*."

# CASES

## IN THE SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1877.

### Commander v. The State.

#### *Indictment for Murder.*

1. *Oath of petit jury.*—When the jury, in a criminal case, are sworn to “well and truly try, and true deliverance make, between the people of the State of Alabama and the prisoner at the bar,” this is not substantially the oath which ought to be administered to them (Rev. Code, § 4092); and the judgment will be reversed on account of this error.

2. *Competency of jurors; objection to venire.*—Persons who have been summoned as witnesses for the prosecution, and persons who served as jurors on a former trial of the case, are not competent jurors, and may be challenged for cause; but the venire will not be quashed because they are knowingly summoned as jurors by the sheriff, when the record does not show that, without them, there was not a sufficient number of good and lawful men from whom a jury might be selected.

3. *Evidence showing state of feeling between prisoner and deceased.*—The fact of anticipated litigation between the deceased and the prisoner, who were connected by marriage, or of family litigation in which the prisoner felt an interest, connected with his declaration that he would kill any one who sued him under like circumstances, is admissible evidence for the prosecution, as bearing on the question of the relations subsisting between him and the deceased, and the state of his feelings towards the deceased; but evidence touching the merits of such litigation is not admissible for him in rebuttal.

4. *Presumption of malice from use of deadly weapon.*—When life is taken by the direct use of a deadly weapon, the law presumes that the killing was malicious, unless the evidence establishing the killing also shows circumstances of justification, mitigation, or excuse, which overturn that presumption.

FROM the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

The indictment in this case charged that the prisoner, Robert Commander, “unlawfully, and with malice aforethought, killed Charles Hagan, by shooting him with a gun.”

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| 60 | 1   |
| 60 | 50  |
| 62 | 12  |
| 63 | 73  |
| 68 | 522 |
| 71 | 6   |
| 71 | 335 |
| 84 | 419 |
| 87 | 61  |

[Commander v. The State.]

"When the cause was called for trial," as the bill of exceptions states, "the defendant objected to the *venire* specially summoned, and moved to quash the same; and, in support of said motion, proved to the court that W. T. McKnight, D. L. Kirkland, Gray Ellis, and W. B. Jones, who were summoned as jurors on said *venire*, were also summoned, by the identical sheriff who summoned them at this term, as jurors on the *venire* to try this case at the last term of the court, and were impaneled and sworn, and sat as jurors in the case at that term, the result being a mistrial; and that James M. Lee" and six other persons, whose names are specified, "who were summoned as jurors for the trial of the case at this term, were also summoned by said sheriff, as witnesses for the prosecution in said cause at said last term, and were then examined as witnesses for the prosecution, and were now in attendance on the court as witnesses for the prosecution. The said proof being made, and the facts alleged in support of said motion, the court overruled the motion, and refused to quash the *venire*; to which action of the court, overruling said motion, and putting said *venire* on him, the defendant, by his counsel, excepted. A jury was then impaneled from said *venire*, and the following oath, and none other, was then and there administered to each of them: 'You do solemnly swear, that you will well and truly try, and true deliverance make, between the people of the State of Alabama and Robert Commander, the prisoner at the bar, whom you shall have in charge, and a true verdict render, according to the evidence: so help you God.'

"On the trial, the State proved that one John Swann and his sister, who was the defendant's wife, were the children of James B. Swann, deceased; that the said John Swann and defendant and his wife were, at the time of the homicide, in the possession of the place occupied by the said James B. Swann as a homestead during his life; that after the death of said James B. Swann, his widow, who was the step-mother of said John Swann and defendant's wife, married said Hagan, and was his wife at the time of the homicide; that said Hagan and his said wife, prior to the homicide, had employed attorneys to sue said John Swann for the recovery of said homestead, in right of Mrs. Hagan as the widow of said James B. Swann; that said attorneys had informed John Swann of said proposed litigation, and that said defendant had also heard of it prior to said homicide: all to show a motive on the part of said defendant to kill said Hagan. The State introduced evidence, also, tending to show that, a few days before the killing, the defendant had said, that Hagan had sued John Swann for his land, and



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that, if any one were to sue him so, he would kill him. The defendant then presented, and offered to prove the execution of the deed, under which said James B. Swann had taken and held possession of said land ;" which conveyed to him an estate only during the life of the grantor, J. S. Broome ; "and, in connection therewith, to prove that said Broome had died before said James B. Swann, and that said James B. claimed said lands by no other title. The State objected to the introduction of this evidence, and the court sustained the objection ; to which ruling, excluding said proposed evidence, the defendant then and there excepted. The State proved, that said Hagan, at the time of the homicide, was quite drunk ; and the defendant introduced evidence tending to show that said Hagan, when drunk, had the character of being a dangerous, violent, blood-thirsty man."

The court charged the jury, in writing, as follows : "There are some facts in this case which are undisputed ; that Charles Hagan is dead, and that his death was caused by a gun-shot wound from a weapon in the hands of the prisoner at the bar. What was the motive in the breast of the prisoner that actuated him at the time he fired the fatal shot ? It is a principle of law, founded upon reason and the experience of mankind, that every man is presumed to intend the natural consequences of his own acts. *When life is taken by the direct use of a deadly weapon, the law presumes that the killing was malicious, and casts on the defendant the onus of rebutting it, unless the evidence establishing the killing also shows circumstances of justification, excuse, or mitigation, which overturn that presumption.* So, in this case, if the jury believe, from the evidence, that the prisoner at the bar killed Charles Hagan with a gun, the law presumes that the killing was malicious, and imposes on the defendant the burden of rebutting that presumption, unless the evidence which proves the killing also shows it to have been done without malice. Do the facts elicited from the witnesses show that the homicide was not done with malice ? The defendant says, that he shot the deceased without fault on his part, and to save his own life, or to prevent great bodily harm to his person. Every one has the right, in a proper and lawful manner, to defend his own person and property, against one or many, who manifestly intend, or endeavor, by violence or surprise, to commit a known felony on either. But, to justify the taking of life, there must be an imperious necessity existing to prevent the commission of a felony or great bodily harm, or such appearance of necessity as would impress a reasonable, prudent man (?) that it actually existed. *This necessity cannot be said to have existed, if the defendant could have avoided*

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*the combat, without danger to his life or limb ; as if he voluntarily brought on the combat.* A man can not create a necessity, and then claim the benefit of it. In the case of *Eiland v. The State*, 52 Ala. 332, our Supreme Court has stated the law very clearly, in these words: "There may be cases of murderous assaults, or of assaults with intent to commit other atrocious felonies, from which it is not the duty of him who is assaulted to retreat. When, however, the assault is made on sudden quarrel, and a mutual combat ensues, retreat, if possible, to avoid the threatened danger, is a duty. For, as is said in *Commonwealth v. Drum*, 58 Penn., when it comes to a question, whether one man shall flee, or another man shall live, the law decides the former shall flee, rather than the latter shall die." The essential inquiry for the jury to determine is this: was it necessary for the prisoner to kill Charles Hagan, to save his own life, or to prevent great bodily harm to his person? or, were the circumstances attending the killing such as to impress the defendant with a reasonable belief that such a necessity existed, and that it was imperious and pressing at the time of the killing? and *did the defendant do nothing to bring on the difficulty, or attack, in which Charles Hagan was killed by him?* That is for the jury to say, from all the circumstances proved in the case.

"But the defendant says, that the deceased was a violent, dangerous man, when under the influence of intoxicating liquors; that his own character is that of a peaceable, quiet man; and that the conduct of the deceased, illustrated by his character, was such as to impress the mind of the defendant with a reasonable belief that he was in imminent peril; and in support of this position, he relies upon the evidence he has introduced of character, and on his own statements made soon after the killing had taken place. But the State says, that the character of the deceased was not dangerous when under the influence of liquor, except upon a contingency, as when imposed upon; that if he wore weapons, he wore them openly; that he was a brave man, and would not take the advantage of any one. The evidence as to character, it is unnecessary to say, is conflicting; but the jury must weigh it, and, by a careful discrimination, arrive at a just determination of what was the true character of the deceased. In the eye of the law, it is as great a crime to kill, unlawfully, and with malice aforethought, the vilest and most abject of the human race, as its greatest benefactor. No matter how bad, how dangerous, a man may be, he is still under the protection of the law; and whoever kills such a person, can never justify the killing, unless it is shown that, taking into consideration his acts at the time of



[Commander v. The State.]

the killing, as illustrated by his character, the slayer acted in self-defense. The defendant insists, that his acts and statements after the homicide show that he is guilty of no offense; but the State insists, that the statements made by the defendant are untrue—that they are contradicted by other and reliable testimony: that the defendant himself had proposed, and deliberately, willfully, and with premeditation, determined to kill Hagan, and had dared him across the railroad for the purpose of accomplishing his purpose. Which is the true theory of the case, the jury must determine from all the facts. They must take the statements of the defendant, and ascertain whether they are in themselves reasonable; whether they are contradicted by the testimony of other witnesses, and the interest of the defendant in the result of this prosecution; and *if they should find that these statements were not true—that the killing did not take place as narrated by the defendant—that fact, if the jury should find it to be a fact, would be evidence of guilt on the part of the defendant.* The jury must give his statements a fair and unprejudiced consideration, and must also carefully weigh the testimony of the other witnesses: they cannot capriciously reject the testimony of a single witness, but may look to the relationship they bear to the defendant, or to the deceased, and to their demeanor on the stand, and then reconcile all, if possible; and if they cannot, then they may reject that which they believe to be false, and give credit to what they believe to be true.

“If the jury should find, beyond all reasonable doubt, under the law as stated to them, that the defendant killed Charles Hagan with malice aforethought, and that the killing occurred in this county, before the finding of the indictment, it would be their duty to find him guilty of murder in the first degree, and sentence him to suffer death, or imprisonment in the penitentiary for life. If they should believe there was not that degree of willful, deliberate, and malicious killing which constitutes murder in the first degree, they will then inquire whether he is guilty of murder in the second degree. If he formed the design to kill the deceased, and with malice aforethought executed that design, he would be guilty of murder in the second degree, if the circumstances were such as not to constitute murder in the first degree. Manslaughter is the voluntary killing of a human being, without malice. The essential difference between murder and manslaughter is, that in murder there must exist in the mind of the slayer malice aforethought. No amount of provocation will justify the taking of human life; nor will mere words, or threats, unless the party making them is

[Commander v. The State.]

attempting to execute them, reduce the killing from murder to manslaughter. But, *if the jury should conclude that the defendant killed Charles Hagan unlawfully, but had no malice against him at the time, they would be authorized in finding him guilty of manslaughter in the first degree. They will remember, though, that no matter how great the provocation given on the part of Hagan, if the defendant had time to reflect, and was not actuated by sudden passion when he killed Hagan, he would be guilty of murder, and the previous provocation, taken in connection with the killing, would be evidence of malice.*"

To those portions of the charge contained in the above extract which are italicized, and also to the entire charge, separate exceptions were reserved by the defendant. None of the evidence is set out in the bill of exceptions, except as above stated.

SNEDECOR & COCKRELL, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, for the State.

BRICKELL, C. J.—1. The oath administered to the jury was not, in substance, the oath prescribed by the statute; and its administration is an error fatal to the judgment of conviction, under the authority of *Lewis v. State*, 51 Ala. 1; *Perkins v. State*, at the present term.

2. The motion to quash the *venire* rests on the sole ground, that several of the persons summoned as special jurors were incompetent, because of the relation they sustained to the case. Some of them were witnesses on behalf of the State, and others were of the petit jury on a mistrial of the cause at a former term. There can be no doubt, these persons were not good and lawful jurors, and were subject to challenge for cause. The sheriff, in summoning them, having knowledge of the disqualification, as the bill of exceptions indicates, was grossly derelict in duty, and the Circuit Court should not have permitted the dereliction to pass unnoticed. The right of the State, and the right of the accused, is the summoning of persons free from disqualification as jurors, from whom a jury may be selected; and the sheriff should not be suffered, from mere caprice, or negligence, to narrow or diminish the right. The court, at the instance of the State, or of the accused, would have excluded these persons from the *venire*, and caused others, free from exception, to be summoned in their place. But we cannot regard the summoning of them as cause for quashing the *venire*, which, so far as we are informed, contained a sufficient number of good and lawful men without them, from



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whom a fair and impartial jury could be selected.—*Hall v. State*, 40 Ala. 698.

3. The fact of anticipated litigation between the deceased and the accused, or of litigation in which the accused felt an interest, connected with his declaration that he would kill any one who would sue him under like circumstances, was admissible, as bearing on the question of the relation of the parties and the state of the feelings of the accused towards the deceased. The merits of the litigation was not material. The right may have been against the deceased, but this would not change the fact, that the relation of the parties was hostile. Any evidence touching the merits would have multiplied indefinitely the issues before the jury, and would have served no other purpose than to distract and divert their attention from the real issues they were to try. The Circuit Court did not, therefore, err in excluding the deed from Broome to Swann.

4. We have carefully examined the charge of the court; and it seems to us free from error. It is in harmony with our several decisions.—*Murphy v. State*, 37 Ala. 142; *Eiland v. State*, 52 Ala. 322; *Hadley et al. v. State*, 55 Ala. 31.

For the error pointed out, the judgment must be reversed, and the cause remanded. The prisoner must remain in custody, until discharged by due course of law.

## Perkins v. The State.

### *Indictment for Murder.*

1. *Voluntary offer to confess; admissibility of.*—The prisoner's voluntary offer to the jailer, who had him in charge, to tell all he knew about the homicide of which he was accused, if the jailer would promise that he should not be hurt for it; and his similar offer to a fellow-prisoner, if the latter would promise never to tell any one else; which proposals being rejected, no confessions were made by him,—are admissible evidence for the prosecution.

2. *Oath of petit jury.*—That they will “well and truly try, and true deliverance make, between the people of the State of Alabama and the prisoner at the bar,” is not substantially the oath which the statute requires should be administered to the jury in a criminal case (Rev. Code, § 4092); and the administration of such oath is an error for which a judgment of conviction will be reversed.

FROM the Circuit Court of Sumter.

Tried before the HON. LUTHER R. SMITH.

The prisoner in this case, Ben Perkins, was indicted and

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tried, jointly with one Cæsar Clanton, for the murder of Gilbert Roberts; was found guilty of murder in the first degree, and sentenced to imprisonment in the penitentiary for life, while said Clanton was acquitted. On his trial, the following bill of exceptions was reserved by said Perkins: "Be it remembered, that the following oath, and none other, was administered to each of the jurors in this case: 'You do solemnly swear, that you will well and truly try, and true deliverance make, between the people of the State of Alabama and Ben Perkins and Cæsar Clanton, the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence: so help you God.' On the trial, the State introduced one Turner Bell as a witness, who testified that, as deputy sheriff, he had the defendant, whom he identified as the colored man Perkins, sitting within the bar as a prisoner, under arrest on a warrant charging him with the murder of Gilbert Roberts; that the day after the homicide, at the request of said Perkins, he locked him up privately with Sol Brown; that Brown called him, after a little while, and said that Perkins wanted to talk with him; that he then went to them; that he had previously made no promises to the defendant, nor threats against him, to induce him to confess, and then made no promises or threats; that all said by said Perkins in his presence was voluntary, so far as he knew; that Perkins took him by the hand, and told him he would tell him all about the killing of Roberts, if he, witness, would promise that he should not be hurt; that he, witness, refused to make any such promise, and thereupon Perkins said nothing more. Sol Brown, a colored witness for the State, testified that, the day after Roberts was killed, he was locked up with the defendant by said Bell; that he called Bell back at the request of the defendant; that he, during Bell's absence, had made no promises nor threats to said defendant, to induce him to confess, and made no attempt to induce him to confess, and heard no one else do so; that he was alone with said defendant until Bell came back; that all said by defendant in his presence, so far as he knew, was voluntary; that Perkins asked him, twenty times, if he would tell on him, if he told him all about the killing of Roberts; that he refused to so promise, and thereupon defendant said nothing more to him. To the introduction of each of said alleged statements of the defendant, made to said Bell and Brown, as they were severally offered, the defendant objected and excepted; which objections and exceptions were severally overruled by the court," &c.

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51 Ala. 1; *Newman v. The State*, 49 Ala. 9; *Mose v. The State*, 36 Ala. 211; *Williams v. The State*, 39 Ala. 532.

JOHN W. A. SANFORD, Attorney-General, for the State.

MANNING, J.—The bill of exceptions in this cause does not undertake to set forth the evidence, further than was thought necessary to present the questions which were argued here. The testimony of the jailer and of Sol Brown is not of any confessions made by the prisoner, but of his taking the hand of the jailer, and offering to tell all he knew about the killing of Roberts, if the jailer would promise that he, the prisoner, should not be hurt therefor, and of like offers to tell the same to Brown, if Brown would promise never to tell anybody else; and both of the witnesses having refused to make such a promise, the prisoner said nothing more to them on that subject. No inducement or influence, proceeding from either of the witnesses, or any other person, caused the prisoner to say or do anything, of which evidence was given. This evidence was, therefore, not subject to exclusion, upon the ground that the prisoner did not act freely; and it was admissible to show circumstances which, connected with other circumstances and facts, might properly be considered by the jury, in their endeavors to determine whether the prisoner was guilty or not of the crime of which he was accused.

Suspicious conduct on the part of a person, who was in a situation in which he might have killed another, is frequently allowed to be proved in prosecutions for homicide. Of course, jurors should be careful not to attach to such circumstances too much importance, and be watchful over themselves, to avoid being led to conclusions which those circumstances do not very forcibly conduce to support. There is a just caution against too much facility in this, contained in the opinion in *Lyles v. State*, 30 Ala. 24.

2. In *Lewis v. State* (51 Ala. 1), it was held, that an oath like the one administered in this cause—"to well and truly try, and a true deliverance make, between the *people* of the State of Alabama and the prisoner at the bar"—was "not substantially the oath required and prescribed by statute," and was, therefore, insufficient. It is pointed out in the opinion that the constitution commands that "all prosecutions shall be carried on in the name, and by the authority, of 'The State of Alabama,' and conclude against the peace and dignity of the same," and are in fact so instituted and conducted; and that when, exceeding the particularity required by the statute, the jury are sworn to try an issue



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joined between "the *people* of the State of Alabama" on one side, and the accused on the other, the oath is vitiated, by being restricted to a prosecution different from that in which the verdict is rendered.

Let the judgment be reversed, and the cause be remanded. The prisoner must remain in custody, until discharged by due course of law.

## Washington v. The State.

### *Indictment for Murder.*

1. *Oath of petit jury.*—A recital in the judgment entry that the jury "were sworn and charged well and truly the issue joined to try, wherein the State of Alabama is plaintiff, and R. W., the prisoner at the bar, is defendant on trial, and a true verdict to render according to the evidence," sufficiently shows a substantial compliance with the requisitions of the statute (Code of 1876, § 4765) as to the oath to be administered to the jurors.

2. *Homicide perpetrated by firing pistol into dwelling-house, without specific intent to kill.*—Where the homicide was committed by firing a pistol, by night, through the window of a lighted room, in which four persons were sitting around the fire, the court may properly refuse to instruct the jury, on the request of the prisoner, that if he did not intend to kill or shoot at any of the inmates of the room, but merely intended to frighten them, he was not guilty of any higher offense than manslaughter in the second degree: such a charge, without qualification, or explanation, was calculated to mislead the jury, by withdrawing from their consideration the recklessness of the act, as showing a depraved mind regardless of human life (Code, § 4795), which might make the offense murder in the first degree.

FROM the Circuit Court of Hale.

Tried before Hon. GEO. H. CRAIG.

The prisoner in this case, Robert (or Barcus) Washington, was indicted for the murder of Beverly Willis, by shooting him with a pistol; was convicted of murder in the first degree, and sentenced to imprisonment in the penitentiary for life. On his trial, he reserved a bill of exceptions, which purports to set out all the evidence adduced. The shooting occurred on a Tuesday night in November, 1876, in the house of one Albert Jackson, who was a freedman, as were also the prisoner and the deceased; and the deceased died, from the effects of the wound, on the ensuing Thursday. The circumstances immediately connected with the killing, and the house in which it occurred, were thus stated and described by said Allen Jackson, who was examined as a witness for the State: "I was at my house that night. My wife and I, Bina Jackson, my niece, and Beverly Willis were sitting

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around the fire-place, where there was a fire burning; and there was also a lamp burning on the mantel-piece. The house is from sixteen to eighteen feet square; the chimney is on the north end, and the door on the east side; there is a window opposite the door, on the west side, and a small window on the north side, next to, and on the west side of the chimney; in the west window, about one-third of one of the lower panes of glass is broken out, the opening being made transversely across the pane. I and Bina were sitting together on a box, on the east side of the fire-place, Beverly Willis in front of it, and my wife on the west side. While we were thus sitting there, between seven and eight o'clock at night, and Beverly was stooping down to tie his shoes, a pistol was fired through the west window, through the broken pane of glass. The sash and curtain were down. As soon as the pistol fired, Beverly rose up, and said, '*I am shot; Barcus shot me.*' He asked me to call Nat Collins, his brother-in-law, which I did, standing in the door. He went for the doctor when he came, and we laid Beverly down on the bed." The witness further testified: "I was present the next morning when the defendant came in to see Beverly. When he came in, Beverly held out his hand, and Barcus took it, and they shook hands. Defendant then sat down in a chair by the bed-side, and asked Beverly how he felt; and Beverly said he felt better than he did in the night. He then asked defendant what made him shoot him; and defendant replied: '*I know I shot you, Beverly, but I didn't aim to do it: I intended to shoot through the window, at the door opposite, to scare you all; I didn't aim to do it, and I am sorry for it.*'" The witness stated, also, that the deceased and the defendant had always been on friendly terms, and so declared to each other on that occasion; and that the defendant was a quiet and peaceable man, and was never before engaged in any difficulty so far as he knew.

Dr. Henly, the physician who was called in, was introduced as a witness on the part of the State and described the wound and its effects; and he further testified, as to what occurred when he visited the deceased on the morning after the shooting, as follows: "When I entered the house, the defendant was sitting near the deceased, and talking to him; and he moved, so as to allow me to get near the deceased. I asked the defendant, why he shot Beverly. He at first hesitated, and then said, '*I didn't intend to hurt Beverly when I fired the pistol.*' Prior to this, he had told Beverly, in my presence, that he had shot him, but did not intend to do it, and was sorry for it; and both said, that they had always been friendly, and had never had a cross word with each



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other. Some twenty minutes after this, defendant said, '*I intended to shoot in the direction of the door.*' Beverly then said to him, '*Speak the truth; come now, Barcus, you done owned it; tell the truth about it;*' to which the defendant made no reply. After the parties had been thus conversing for some time, the defendant left the bed-side, and sat down by the fire-place; and I then undertook to probe the wound. I found, somewhat to my surprise, that the wound appeared to range slightly upward; and I turned to the defendant, and asked him, if he could show me the position of Beverly at the time of firing the pistol. He said, yes: that he was sitting in a chair, leaning over, tying his shoes; and he then took a chair, at my suggestion, and showed me, by the position of his own body, how Beverly was sitting at the time. I told Beverly, when I first called to see him, that the wound was fatal, and that he would die from it in a short time."

Adam Page, also a freedman, and a witness for the State, testified that, on the night of the shooting, hearing the report of the pistol, and Allen Jackson calling, he started to go to said Jackson's house, and met a man on the road, whom he recognized as the defendant, running in the opposite direction; that the man was in the same path that he was in, but turned out of it before meeting him; that on the next morning, at the house of Nat Collins, where several persons were assembled, the defendant came up while they were talking, and said, "that he had shot Beverly with the pistol then in his hand, but it was an accident: that he did not intend to shoot him, but shot into the house to scare them;" and that he then told witness, he was the man whom he had met running the night before. Nat Collins, another witness for the State, testified that, while going from the house of Allen Jackson on the night of the shooting, to summon the physician, "he saw a man running along the road in the same direction he was going; that the man stopped, and sat down by the side of the road; that, on coming up, he recognized him as the defendant, sitting there with his banjo in his hand; that he stopped, and asked him, '*Barcus, what made you shoot Beverly?*' and he replied, '*I did not do it.*' Richard Collins, another witness for the State, who said that he was a "great uncle" of the defendant, and went, with others, to arrest him, early in the morning on the day after the shooting, testified that he asked the defendant, while under custody, why he shot Beverly; and that he replied, "*I did not do it.*" Lewis Beverly, another witness for the State, who was also one of the arresting party, testified that, after the arrest, "while on the way, he heard defendant say he shot Beverly."

Bina Jackson was also introduced as a witness for the



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State, and testified, as to the position of the persons in the room when the pistol was fired, as Allen Jackson had testified; also, that Beverly was in a line between her and the window, on the west; that the window was down, and the curtain drawn, and the pistol was fired through the opening in the broken pane of glass. "Witness testified, also, that there had been illicit intercourse between her and the defendant for several years; that she had two children by him, and that he had promised to marry her, but had married another woman; that he saw her a few days after his marriage, and told her that he loved her as well as ever; that she told him he was married now, and must not talk so to her, and they then parted. She testified, also, that she went to preaching on the Sunday night before the shooting, at the house of Ben Muse on the Smaa place, and that Beverly Willis escorted her to and from church that night." Moses Marshall, another witness for the State, testified as follows: "I was at preaching at the house of Ben Muse, on the Smaa place, the night before Beverly was shot. I know Beverly, and I know the defendant. I saw them both at preaching that night. I was standing outside of the church, just before the close of the meeting, when Albert Jackson and his wife, and Bina Jackson and the defendant, came out, and started towards their homes. Beverly was walking by the side of Bina Jackson. Defendant and I were standing there at the passage-way, and we then went to the fodder-stack to cut a stick. I said to defendant, '*Let Beverly alone; he is a single man: you go along with your wife,*' who was then in the church. Defendant said, '*Damned if he didn't want to see Beverly out to-night;*' and he cut a stick from a cedar bush that was lying on the stack. That was all that was said, and me and him then turned and went back to the church." Ben Muse also testified, on the part of the State, that he saw the defendant and his wife at his house on the night of the preaching, but did not recollect seeing either Albert Jackson, or his wife, or Bina Jackson, or Beverly, on that occasion; and that he saw Moses Marshall and the defendant coming back to the house, from the direction of the fodder-stack, about the close of the meeting.

On the part of the defendant, Maria Brown, who said that she was his sister, testified that there was "bad feeling" existing between him and the family of Moses Marshall, growing out of some "rent cotton" which the latter owed to the defendant; and that the defendant had borrowed the pistol, a few days before the shooting, when about going over to the Marshalls' place to get the cotton. Nathan Taylor, another witness for the defendant, testified that, on the night the

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shooting occurred, "there was a quilting and dance at the 'Val place,' about a quarter of a mile from the house of Albert Jackson; that defendant was at his house just after dark, about seven o'clock, and they went together to the 'Val place,' where defendant was to play for them, he being a banjo-player; that they went along together in good spirits, and full of fun; and that after they got there, and mingled in the crowd, he did not see the defendant again that night." This witness, and another also, testified that the defendant "was always full of fun and frolic and jokes;" and all of the witnesses, examined as to character, testified that he had always been quiet, peaceable, orderly, and kind.

"This being all the evidence, the court charged the jury, among other things, as follows: 'If the evidence satisfies the jury, beyond a reasonable doubt, that the defendant shot into the house where the deceased and several other persons were at the time, and that the defendant did the shooting willfully, and knowing at the time that the persons were in the room, then such shooting would be unlawful; and if it resulted in the death of Beverly Willis, and the act evidenced a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, he would be guilty of murder in the first degree. If a person does an unlawful act, the law charges him with the knowledge of the probable consequences of such act. The jury may look to the fact that Beverly was killed, if it is shown, in connection with all the other evidence in the case, in determining whether or not the defendant, at the time, had such depraved mind as rendered him regardless of human life.'

"To the giving of this charge, and to each and every part thereof severally, and especially to the last clause, the defendant then and there excepted, and requested the court to give the following charges, which were in writing: '1. That if they believe, from the evidence, that the defendant, at the time he shot into the house, did not intend to shoot at Beverly Willis, or any of the parties present, but intended to shoot in the house merely to frighten the inmates, they can not convict him of manslaughter in the first degree.' '2. If the jury have any reasonable doubt, arising from the evidence, whether the defendant, at the time he shot into the house, shot at, or intended to shoot at, Beverly Willis or other occupants, or whether he only intended to shoot into the room to frighten the inmates, they must give him the benefit of that doubt, and acquit him of manslaughter in the first degree.' '3. If the jury believe, from the evidence, that the defendant fired the pistol into the house for the purpose



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of frightening the inmates, and without aiming at, or intending to shoot any one, such action was an unlawful act, and a trespass; and if in the prosecution of such unlawful trespass Beverly was accidentally killed, the defendant is responsible for the consequences of the unlawful trespass, and is guilty of manslaughter in the second degree.' '4. If the jury find, from all the evidence in the cause, that the following is a reasonable theory for the defense, growing out of the evidence: that the defendant fired a pistol into a room, which he knew to be occupied by four persons, without any design to do any personal injury to any of the occupants, but with the design simply to frighten them, and that death ensued, by accident, to one of the occupants, from such unlawful firing; then it is the duty of the jury to convict the defendant of manslaughter in the second degree; and upon the supposition that this hypothesis is reasonable, and arises naturally out of all the evidence, it is the duty of the jury to acquit the defendant of murder, and of manslaughter in the first degree.' The court refused each of these charges, and the defendant excepted to the refusal of each."

After conviction, the defendant moved in arrest of judgment, on the following (with other) grounds: "Because a proper *venire*, as required by law, was not served on him one entire day before the trial, in this: the court ordered fifty jurors, in addition to the regular jurors for the week, to be served on the prisoner; Bud McCreary and William Shackelford were duly and regularly impaneled, sworn, and charged as regular jurors for said week, but were never served on the prisoner, nor were their names placed in the hat to be drawn out, nor were they in any way offered to the prisoner, nor was any opportunity whatever given to him to select them as jurors to try his case." The bill of exceptions sets out the motion in arrest of judgment, and then adds: "And the facts recited therein being proved, and the same being argued, and by the court understood, the said motion in arrest was overruled and denied;" to which an exception was reserved by the prisoner. The judgment entry sets out the order of the court for a special *venire* and the service of a copy of it on the prisoner, the *venire* summoned by the sheriff, with his return, stating that he had served a list of the jurors, with a copy of the indictment, on the prisoner. The *venire*, as copied in the judgment entry, contains the names of eighty persons, thirty of whom are said to have belonged to the regular panel for the week; but the names of Bud McCreary and William Shackelford do not appear among them.

The judgment entry contains, also, the following recital as to the organization of the jury: "To each of said jurors,



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as drawn, the court propounded the questions required by the statute (Rev. Code, § 4180), and caused each of said jurors, as drawn and questioned, to be put upon the prisoner for acceptance or challenge; and the persons above named having been accepted by the prisoner and the State, as the jury to try said cause, the said jury, so impaneled as aforesaid, were sworn and charged well and truly the issue joined to try, wherein the State of Alabama is plaintiff, and Robert Washington, the prisoner at the bar, is defendant on trial, and a true verdict to render according to the evidence."

A. A. COLEMAN, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, for the State.

STONE, J.—The record disproves the assertion, that no list of the jurors summoned for the trial of the prisoner was served on him, as the law directs; and we think the oath administered to the jury, was, in every respect, full and complete. The statement of the record is, "And the said jury, so impaneled as aforesaid, were sworn and charged well and truly the issue joined to try, wherein the State of Alabama is plaintiff, and Robert Washington, the prisoner at the bar, is defendant on trial, and a true verdict to render according to the evidence." The word *sworn*, used in the connection above, *ex vi termini* imports that they were sworn according to the formula observed in our courts of justice; and the residue of the recital conforms substantially to the statute.—Code of 1876, § 4765.

2. "Every homicide, . . . perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree."—Code of 1876, § 4295. The prisoner, in his confession, disclaimed any intention to injure any one, and declared that his purpose was only to frighten the inmates of the house. For the purpose of considering this feature of the defense, apart from all others, we leave out of view all evidence of motive, malice, or formed design, as indicated by the prisoner's conduct at the preaching on the Sunday night preceding, by his sudden flight from the scene of his violence, and by the testimony of Bina Jackson. On this question we confine ourselves to the manner of the shooting itself, and to the proved position of the inmates of the house, at the time the pistol was fired. If the object was simply to frighten, why fire the pistol into the house? Why not fire it near the window, and pointed up-

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ward, or from the house? The testimony is, that there were a burning fire and lighted lamp in the room. Then, why fire diagonally through the room, in the direction of where three of four inmates sat, near the fire, and not across the room, towards the door, which would have harmed no one? The light in the room enabled him to discern where the inmates sat. Then, why fire the pistol, directed in proper range towards one or more of them, if his object was only to frighten?

We have given expression to these reflections, not with any view of pronouncing on the facts. That is not for us. Our sole object is, that we may pronounce on the correctness of the charges asked and refused, in the light of the testimony before the jury. All the charges asked were properly refused, under the state of the proof before the jury. They were well calculated to mislead, by withholding from their consideration one of the most damaging tendencies of the testimony. They ignore, altogether, the reckless discharge of a loaded pistol, pointed, at short range, directly towards persons sitting quietly together, unconscious of danger; and the inference arising therefrom, of a depraved mind, regardless of human life. To have justified the giving of either of the charges, the jury should have been told that, to constitute such mitigation of the offense, it was necessary that there should be an absence of that depraved mind, which does not regard human life.—2 Whar. Cr. Law, §§ 965, 997. Sport does not usually employ such dangerous methods as were resorted to in this case; and before the jury are justified in inferring the less wicked motive, sought in the charges to be inferred, they should be affirmatively convinced that there was not the depraved mind, which the recklessness of the act tended to show.

The affirmative charge of the court is a correct exposition of the law.

The judgment of the court is affirmed.

[Sandy v. The State.]

## Sandy v. The State.

### *Indictment for Trespass after Warning.*

1. *Trespass after warning; meaning of "premises."*—The word "*premises*," as used in the statute punishing a trespass after warning (Code of 1876, § 4419), means any real estate for an entry on which a civil action might be maintained, and includes an inclosed pasture situated more than a mile from the dwelling-house.

FROM the Circuit Court of Sumter.  
Tried before the Hon. LUTHER R. SMITH.

SNEDECOR & COCKRELL, for the prisoner.—The policy and purpose of the law, under which this prosecution was instituted, using the words *dwelling-house* and *premises* in juxtaposition, was to protect the immediate surroundings of the dwelling; and the statute can not be extended to uncultivated lands beyond the view of the residence, and more than a mile distant from it; especially when it was not shown that the defendant knew that the lands belonged to the prosecutor, or that they were included in the prohibition. The meaning of the word *premises* is commented on in 11 Ala. 594; 14 Ala. 242; 30 Ala. 46; 31 Ala. 353; 33 Ala. 431; 36 Ala. 297; 40 Ala. 376, 720.

JOHN W. A. SANFORD, Attorney-General, for the State. The word *premises* signifies "lands and tenements."—Bouv. Dic. There is nothing in the statute which confines it to lands adjacent to the dwelling.

BRICKELL, C. J.—The statute under which the indictment is found reads as follows: "Any person who, without legal cause, or good excuse, enters into the dwelling-house, or on the premises of another, after having been warned, within six months preceding, not to do so, is guilty of a misdemeanor," &c.—Code of 1876, § 4419. The evidence tended to show that, after warning, the defendant was seen in the pasture of the prosecutor, which was inclosed, but not cultivated, and was a mile, or a mile and a half, from the prosecutor's dwelling-house. The instruction of the court to the jury was, that the pasture was embraced in the term "*premises*," as employed in the statute; and the correctness of this instruction is the only question for consideration.



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The term *premises* has various significations, dependent on the subject-matter to which it refers. When used in reference to estates, it signifies lands and tenements; while, when employed to designate a formal part of a deed, it refers to the part preceding the *habendum*; or, if in reference to equity pleading, it signifies the stating part of the bill. 2 Bouv. Law Dict. 364. Its proper signification is readily ascertained from the connection in which it is found. Trespasses on real estate the statute is intended to prohibit; and any real estate, for an entry on which the prosecutor could maintain a civil action, is within the meaning of the term *premises* as it is employed in the statute. The operation of the statute, as of several other sections of the Code immediately preceding it, is to convert a civil injury at common law, into an indictable offense; hence, the fines imposed on conviction go to the party injured. The instruction of the Circuit Court was correct, and its judgment is affirmed.

## Allen v. The State.

### *Indictment for Murder.*

1. *Oath of petit jurors.*—In a criminal case, where a special jury is impaneled, it is the better practice to swear each juror separately as he is selected; but, where the record shows that each was sworn separately, and all were afterwards collectively sworn, the oaths administered being substantially the same as prescribed by the statute (Code of 1876, § 4765), this is not erroneous.

2. *Impeaching witness by proof of weak mind or memory.*—When a witness in a criminal case, testifying as to facts which occurred immediately before and after a homicide committed two years previously, admits that he can not “step off one hundred yards and count it—that he would forget how far he had gone before he counted a hundred”—and his testimony otherwise shows weakness of mind, there is no error in refusing to allow him to be asked, on cross-examination, as to his superstitious notions concerning the effects of certain roots: such evidence is too remote from the issue, and does not tend to show that he was not a good observer of facts, and faithful in narrating them; nor is it erroneous to refuse to let him be asked, “for the purpose of testing his recollection,” whether he did not swear, on the prisoner’s application for bail several months before, “that he was weak-witted.” (MANNING, J., dissenting as to the latter proposition.)

3. *Declarations made by defendant immediately after commission of homicide.*—Declarations or statements, explanatory and exculpatory, made by the defendant immediately after the commission of the homicide, to the first persons who came up, and admitted on the trial, without objection, as a part of the *res gestæ*, are not governed by the rules which apply to confessions, and it is not necessary that the record should affirmatively show that, before they were admitted, they were proved to have been made freely and voluntarily.

4. *Charges as to imminent danger, or apprehension thereof.*—Held, that the following charges were calculated to mislead the jury, and were properly re-

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fused: "That if the jury have a reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of great bodily harm at the time of the killing, they must give the prisoner the benefit of that doubt, and acquit him;" "That if the circumstances were such as to create a reasonable belief in the mind of the accused that his danger was imminent, then the law says he may strike in self-defense."

FROM the Circuit Court of Marengo, on change of venue from Choctaw.

Tried before the Hon. LUTHER R. SMITH.

The prisoner in this case, Brad Allen, was indicted for the murder of Frank Allen, his brother. The trial was removed, on his application, from Choctaw to Marengo county; and on his trial in the latter county, in May, 1878, he was convicted of manslaughter in the first degree, and sentenced to the penitentiary for seven years. "On the trial," as the bill of exceptions states, "the jurors having been drawn and summoned according to law, as each juror was drawn, he was sworn to answer questions; and having been passed on and accepted, the following oath was administered to each: 'You do solemnly swear, that you will well and truly try all issues, and execute all writs of inquiry, which may be submitted to you during the present day of court, and true verdicts render according to the evidence: so help you God.' After the full jury had been passed upon and accepted, and separately sworn as above stated, the court, of its own motion, directed the jury to stand up, and the clerk administered to them in a body the following oath: 'You, and each of you, do solemnly swear, that you will well and truly try the issue joined between the State of Alabama and Brad Allen, the defendant now at the bar, and a true verdict render according to the evidence: so help you God.' The defendant's counsel made no objection, but remarked, that the Supreme Court had said the oath should be administered to each juror as he was passed on."

The deceased and the defendant lived together on the same plantation, and in the same house; and no other white person lived on the place. The homicide was committed early in the morning, when no other person was present; and they both had been drinking, if they were not actually drunk at the time. It appeared from the testimony of several negroes who were employed as laborers by the two brothers, and who were examined as witnesses on the part of the prosecution, that Brad Allen, the defendant, a few minutes before the shooting, sent Henry Brown, with Margaret Jones, to go and catch a pony for the said Margaret; and on his delay in starting, the defendant "caught him by the collar, cursed him, and said he would shoot his head off, if he did not go



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and get the pony." Just then, Frank Allen came up, and asked, "What is the matter?" or, "What is this fuss about?" Thereupon, as one of the witnesses testified, "Brad Allen turned to him, and said, 'Do you take it up?' to which Frank Allen replied, 'No,' and walked off." Another witness said, "that when Frank came up, and asked what was the matter, Brad Allen told him, he wanted Henry to go after the pony, but he seemed slow about starting; that they both stepped off a little piece, and were talking together friendly; that they did not quarrel at all when Frank came up." A third witness testified, "that when Frank came up, and asked what was the matter, Brad told him he wanted Henry to go after the pony; that Frank said, 'I thought there was something the matter, as I could find no whiskey in the jug this morning;' that Frank said, also, he might let Henry get his breakfast first; that both of them seemed to be drinking, but were not drunk; that they seemed to quarrel at first; that Brad Allen had his hand up, and was gesturing excitedly with it; that Frank told him, if he did not take his fist out of his face, he would smack him over; that they seemed to become pacified, and began to laugh and talk friendly." Frank Allen had on a pair of pantaloons belonging to his brother, and told one of the servants to get him another pair, as he wanted to go to town; but Brad said, "You can keep on mine to-day, as I am going to stay at home." This was the substance of the testimony, as to what occurred between the two brothers just before the shooting. A few minutes afterwards, two reports of a pistol being heard, the servants came back to the house, and found Frank Allen lying on the floor, near the bed, partly undressed, and dead, having been shot through the head. His knife was lying on the floor, as Margaret Jones testified on the part of the defense, and was picked up by her; it was "a spaying knife, about five or six inches long, and was open." The testimony of the servants, as to what was said and done by the defendant when they ran back to the house, was also conflicting. Henry Brown said: "He and Margaret Jones had gone after the pony, and were returning, and had got in full view of the house, when he heard two pistol shots fired in quick succession, and saw Margaret Pruitt go up to the house; that he rode on towards the house, but, when he got near it, he turned his horse back and started to run; that Brad Allen called to him to come back, that he did not intend to hurt him, and said, '*I have done what I intended to do.*'" Kitty Allen said, that when she reached the house, the defendant said to her, "I have killed Frank;" that she then asked him, why he had done it; that he replied, "*Frank imposed on him,*" and that she then said



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to him, "No, Mass' Brad, it was whiskey." Vicey Nunnerly, who was with Kitty Allen at that time, testified that the defendant told her, "*He had killed Frank because he imposed on him and Margaret Jones.*" Margaret Pruitt, a witness for the defense, testified: "When she got to the door, she met Brad Allen coming out; and he spoke to her, and said, '*I have killed Frank.*' She said, 'Have you killed him dead?' He said, '*Yes, by God, I have killed him dead; but God knows, if I had not killed him, he would have killed me; and I would give the world, if I could breathe life back into him again.*'" There was no objection to any part of this evidence. Exceptions were reserved by the defendant to several rulings of the court on the cross-examination of Henry Brown, who was one of the witnesses for the prosecution, and whose testimony was, in several particulars, conflicting with that of other witnesses. The opinion states the material facts bearing on these questions. Dr. Allen, a brother of the defendant and the deceased, testified that the latter was a dangerous man—quick, irritable, aggressive, violent, and uncontrollable when excited; that the attachment between the two brothers was somewhat remarkable; and that, in all their disputes, Frank was the aggressor, while the defendant was disposed to yield. Other witnesses testified to the same effect, as to the character of the two brothers, and the relations which existed between them.

"The court charged the jury orally, to which no exception was taken by the defendant. The defendant asked the following charges, which were in writing, and which the court gave: 'That unless the evidence against the prisoner should be such as to exclude to a moral certainty every supposition but that of his guilt of the offense imputed to him, the jury must find him not guilty.' 'That unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt, they must find him not guilty.' 'That if there is any reasonable hypothesis arising from the evidence, consistent with the innocence of the defendant, they must find him not guilty.' 'That if the jury have a reasonable doubt whether the killing was done with malice, or under heat of blood in sudden quarrel, without malice, they must give the prisoner the benefit of this doubt.' 'That unless the evidence satisfies the jury beyond a reasonable doubt, and to a moral certainty, that the defendant killed the deceased with malice, they can not find him guilty of murder.' 'If a person, on trial for an alleged offense, offers no evidence of his good character, no legal inference can arise from such omission that his character is bad, or that he is guilty of the offense charged.' 'If there

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is no evidence of the facts attending the killing, the jury are authorized to consider the defendant's declaration, 'that he done it to save his own life,' with the other evidence in the case, to enable them to determine who was the aggressor, and may, if sufficiently believed by the jury, generate a doubt of the defendant's guilt.'

"The defendant asked the court, also, to give the following charges, which were in writing, and which the court refused to give: 'If the jury have a reasonable doubt, whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of great bodily harm, at the time of the killing, they must give the prisoner the benefit of that doubt, and acquit him.' 'If the jury believe, from the evidence, that the circumstances were such as to create a reasonable belief in the mind of the accused that his danger was imminent, then the law says he may strike in self-defense; and in determining this, the jury have a right to consider the character of the deceased as proved, with the other evidence in the case.' To the action of the court in refusing said charges the defendant excepted."

The court afterwards instructed the jury, on the request of the prosecuting attorney, "that 'unless the evidence against the prisoner should be such as to exclude to a moral certainty every supposition but that of his guilt of the offense imputed to him, then they must find him not guilty,' means only that they must be satisfied beyond a reasonable doubt of the defendant's guilt;" and "that 'the exclusion to a moral certainty of every hypothesis but that of the prisoner's guilt,' means only that the jury must be satisfied from the evidence, beyond a reasonable doubt, of his guilt;" to which additional charges the defendant excepted.

THOS. W. COLEMAN, for the prisoner.—In the organization of the jury, the record shows the proper oath improperly administered, and an improper oath properly administered. *Drake v. The State*, 51 Ala. 30, and authorities there cited. The record shows, also, that several different confessions of the prisoner were admitted in evidence against him; and it fails to show that the necessary preliminary evidence was adduced.—*Bill Miller v. The State*, 40 Ala. 59. The questions propounded to Henry Brown, which the court suppressed, were calculated to impeach his testimony, by showing that his mind was disordered, and his memory very deficient. It was material to show this, since his testimony conflicted with that of other witnesses; and no objection can be taken to the form of the questions. In the matter of the instructions to the jury, the court violated the principles



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announced in *Oliver v. The State*, 17 Ala. 587; *Harrison v. The State*, 24 Ala. 67; *Noles v. The State*, 26 Ala. 31; *Eiland v. The State*, 52 Ala. 322.

JOHN W. A. SANFORD, Attorney-General, for the State.—The prisoner's declarations, made immediately after the commission of the homicide, were merely explanatory statements, constituting a part of the *res gestæ*, and were admitted without objection. The charges asked and refused were calculated to mislead the jury, and did not assert correct legal propositions.—*Adams v. The State*, 52 Ala. 379. They might have been refused, because they were abstract.

MANNING, J.—There was no error in the swearing of the jury. The two oaths were substantially the same. The usual practice is to swear each juror as he is selected, and that is the better practice. In this instance, they were sworn first singly, and afterwards collectively.

2. One of the State's witnesses, a negro man, testified to many particulars, some occurring at different times, adverse to the defendant below; and being cross-examined, he confessed, with much apparent simplicity, infirmities of mind. He said, he "did not know how far one hundred yards, or two hundred yards, were exactly; that he could not step off one hundred yards and count it; that he would forget how far he had gone before he counted a hundred; that his memory was weak and bad; that when he was excited, his mind became confused, and seemed to go out from him; that when a white man spoke to him short, he seemed to lose his mind; that he was excited and scared that morning, when Mr. Allen took him in the collar; that he trembled all over, and had never got over it, and was still frightened from it," &c. This was about two years after the events which had so excited him. Defendant then asked the witness, "if he did not swear on the trial in Choctaw county, before Judge Warren, in the matter of the application for bail by Brad Allen, that he was 'weak-witted.'" The State objected to the question; the objection was sustained, and the defendant excepted. The defendant then asked the same question, and stated that his object, in asking the question a second time, was to test the recollection of the witness. The State objected, and the objection was sustained again, and the defendant excepted. "The defendant then asked, if he did not believe that some people eat little white roots for certain purposes. The State objected to the question. The defendant stated to the court that the object . . . was to show the mental capacity of the witness—that witness entertained singular opinions, and



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one of them, by eating certain white roots, that gave them peculiar powers." The objection to the question was sustained, and defendant excepted.

The general mental capacity of the witness seems to have been pretty well disclosed, by his answers to questions previously put; and the interrogatory about superstitious notions associated with certain white roots, whether derived from tradition, or the invention of his own fancy, was too remote from the subject to be allowed.—*Blakey's Heirs v. Blakey's Adm'r*, 33 Ala. 611. Besides, such notions need not hinder him from being a good observer of facts, and faithful in narrating them. But, the question about what he said on a preliminary examination about the same matter, some months before, *when put to test his memory*, appears to me admissible. True, he had already testified, in reply to interrogatories, that his memory was weak. But his answers make the impression that he was rather "weak-witted," than of defective memory. He can not be regarded as a good witness, or an expert, in respect to his own mental condition. He evidently had but little of that power of analysis, which enables one to ascertain the nature of peculiar defects. His testimony, touching several matters, differed from that of some of the other negro witnesses, but was apparently given in a manner to inspire confidence in its truthfulness. Therefore, it might be important to show, by such a test as that proposed, that the memory of the witness was not to be trusted; that he was speaking of things that existed only in his imagination. But my brothers think the matter inquired about was not relevant enough, and that the ruling of the circuit judge should not be reversed.

3. We do not find any evidence of *confessions* in the record. What are referred to as such, are but explanations, made by defendant, immediately after the homicide, to the laborers in his employment, and were proved, without objection, as a part of the *res gestæ*.

4. There was no error in the charges given that were excepted to by defendant, nor in the refusal of the court to give the last two of the charges asked in his behalf. The duty of the jury to accord to him the benefit of the "reasonable doubt," was amply impressed, in many forms, upon them. And as to the two charges for defendant, which were refused, the first was calculated to lead the jury off, upon an inquiry concerning what other persons than defendant might have thought of the danger of his situation, and was otherwise objectionable; while the last charge refused spoke of an apprehension of imminent danger to defendant, without specifying the nature of the danger, whether to life, of great

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bodily harm, or some other, to which it is suggested he might have been exposed. In fact, however, there was no evidence of any such danger at all, as to justify the giving of any charge on that subject.

Let the judgment be affirmed.

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### Indictment for Murder.

1. *Murder; statutory degrees of.*—The statutory provisions of Alabama, as to the different degrees of murder (Code of 1876, § 4295), explained, illustrated, and distinguished from the statutory provisions of Pennsylvania and New York.

2. *Homicide perpetrated by act greatly dangerous to lives of others, and evidencing depraved mind regardless of human life.*—A homicide, “perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life,” is, by the terms of the statute, murder in the first degree. This provision of the statute applies to homicides committed from “universal malice,” as it is called in the books; as by purposely discharging a loaded gun into a crowd of people, or wrecking a passenger train on a railroad, whereby one or more persons are killed; but, *ex vi terminorum*, it excludes a homicide which is committed by a blow or injury intentionally aimed at and inflicted on the person killed, though such homicide may be murder in the first degree under another clause of the statute. Hence, where the homicide was committed by a blow with an oaken stick, intentionally aimed at the deceased, it is error to instruct the jury, “that if the homicide was perpetrated by an act greatly dangerous to the life of the deceased, and evidenced a depraved mind regardless of human life, it would be murder in the first degree.”

3. *Self-defense, manslaughter, and murder in second degree.*—When a homicide is committed on sudden provocation, without formed design, it may be murder in the second degree, manslaughter in the first degree, or self-defense, according to the attendant circumstances: if the provocation was mere words, however abusive and insulting, it is murder in the second degree; if a blow or injury given or threatened, not calculated to produce death or great bodily harm, it is manslaughter in the first degree; and if a blow or injury given, or apparently about to be given, calculated to produce death or great bodily harm, the slayer himself not having intentionally brought on the difficulty, and not being otherwise able to escape, it is self-defense.

4. *Error without injury; rule as to, in criminal cases.*—In a criminal prosecution for murder, the doctrine of error without injury, as in civil cases, will not be applied; hence, the judgment of conviction in this case was reversed, and the cause remanded, on account of an erroneous charge to the jury as to the constituents of murder in the first degree, although the conviction was for murder in the second degree, which operated an acquittal of the higher offense.

FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The prisoner in this case, Robert Mitchell, was indicted for the murder of “George, whose other name is to the grand



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jury unknown, by striking him with a piece of wood," or, as alleged in the second count, "with a deadly weapon, to the grand jury unknown;" was convicted of murder in the second degree, and sentenced to the penitentiary for the term of fifteen years. "On the trial," as the bill of exceptions states, "the evidence for the State tended to show that, before the finding of the indictment, and in said county, the defendant and five or six others were at the house of one York Evans; that there was an old bedstead in front of the door of the house, and three or four persons were playing around it with bed-slats; that neither the deceased, who was a young boy and a stranger to all present, nor the defendant, was engaged in this playing; that two of said persons were striking at each other, over the head of the deceased, when he said: '*If you are playing, it is all right; but, if you are not, and you strike me, you will fall, and that damn quick.*' The defendant's brother was engaged in said play, and the defendant was sitting a short distance from the parties; and when the deceased made said remark, the defendant got up, and went to deceased, placed his hand in his breast, and told him not to 'cuss' when he talked to him. The deceased remarked, '*I will not, if you don't cuss when you talk to me.*' The deceased had picked up a bed-slat, and was leaning on it, inside of the bedstead. The defendant went around the house, at a distance of some twenty feet, and returned to deceased, with quite a heavy oak slat of wood. Two persons attempted to prevent him from reaching the deceased, but he passed around them; went to where the deceased was still leaning upon said slat, and, raising said heavy slat of wood, struck the deceased on the head. The deceased fell to the ground, and the defendant jumped upon him; and when pulled off, he said, '*If they had not taken him off, he would have cut him to pieces.*' The deceased died, from the wound, that night. The evidence for the defendant tended to show, that a knife was found at the spot where the deceased fell, and that the defendant, at the time he was pulled off the deceased, said: '*You know why I did it. Don't you see that knife in his hand?*' and that the defendant requested parties present to do all they could for him, and he would pay for it. This being all the evidence, the court charged the jury, among other things, that if the homicide was perpetrated by an act greatly dangerous to the life of the deceased, and evidenced a depraved mind regardless of human life, it would be murder in the first degree."

The defendant excepted to this charge, and it is the only matter here presented for revision.



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THOS. J. SEAY, for the prisoner, cited *Darry v. The People*, 2 Parker's Crim. Rep. 606-49.

JOHN W. A. SANFORD, Attorney-General, for the State.—The charge is in the very language of the statute (Code, § 4295), and is therefore correct.

STONE, J.—Our statute (Code of 1876, § 4295), while it has retained as murder every species of homicide which was murder by the common law, has divided that highest offense against persons into two grades: murder in the first degree, and murder in the second degree. Murder in the first degree is further divided, and defined in four classes: *First*, homicides perpetrated by "poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing." The employment of poison as the agent, or lying in wait to do the deed, either is made sufficient evidence within this class. To come within the other clause, the act must be qualified by each of the named adjectives. Willful—governed by the will, without yielding to reason. Deliberate—formed with deliberation, in contradistinction to a sudden and rash act. Malicious—with fixed hate, or done with wicked intentions or motives, not the result of sudden passion. Premeditated—contrived or designed previously. All these qualities must coexist, to bring the crime within this clause. The law has declared no length of time these wicked elements shall be shown to have existed; and they may be all grouped under the very expressive phrase, *formed design*. To come within this class, there must have been a previously formed purpose to take the life of him who is slain, and it must be accomplished by the voluntary, intentional employment of means calculated to produce death. We can not here declare or define all the acts, and the protean forms of human conduct, which evidence this formed design. They are discussed in the many elementary works and adjudged cases which treat of the crime of felonious homicide. This grade of crime is frequently committed during personal rencontres, into which the parties enter mutually, or in many cases in which the party slain strikes the first blow. Murderers sometimes provoke an enemy, or intended victim, to assault them, that, under the protection which the law is supposed to furnish them, they may wreak vengeance upon him, who, by this contrivance, is made to appear to be the aggressor. A homicide, thus perpetrated, is a most atrocious murder in the first degree. We will resume this discussion further on in this opinion. This first class embraces every species of homicide by unlawful force,

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intended for and aimed at the victim, which our statute denounces as murder in the first degree.

*Second.* Homicides committed in the perpetration of, or attempt to perpetrate, other named crimes. This class needs no explanation. To secure a conviction under it, it is not necessary that the offender should have contemplated, intended, or willed the death of his victim. The combined turpitude of the crime perpetrated or attempted, and the fatal, though unintentional result, raise the offense to murder in the first degree. The first and second classes of our statute defining murder in the first degree are copied from the Pennsylvania statute of 1794. No other murders at common law are murders in the first degree under their statute.—See 1 Russell on Crimes, by Davis, Metcalfe & Sharswood, p. 482, and notes; *Pennsylvania v. McFall*, Addis. 257; *Mitchell v. State*, 5 Yerg. 340; *Dale v. State*, 10 Yerg. 551; *Clark v. State*, 8 Humph. 663; 2 Whar. Am. Cr. Law, §§ 913, 913a.

*Third.* Homicides “perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any human being, other than him who is killed.” This has all the ingredients of the first class, described above, except that in attempting and intending to kill one person, the offender kills another, without intending it. The same wicked, felonious purpose exists in this, as in the first class, and the same injury to the peace and dignity of the State is done; for the law can not institute a comparison between the values of the lives of its several citizens.

*Fourth.* This class brings up the question presented by this record. It embraces all homicides “perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life.” The act, to come within this class, must be greatly dangerous to the lives of others; must be of such character as to evidence—prove—that the offender had a depraved mind, regardless of human life; and must be without any preconceived purpose to deprive any particular person of life. If there was such preconceived purpose to deprive a particular person of life, the offense would fall under the first or third of the above classes, dependent on the further inquiry, whether the offender killed the person intended or another. It will be observed, however, that this fourth class omits all mention of the words, malice aforethought, formed design, willful, deliberate, malicious, premeditated, unlawfully and maliciously, some of which are found in all the common-law definitions of murder, save that from universal



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malice. If a blow or injury, intentionally aimed and inflicted on a particular person, the act being greatly dangerous to life, and itself evidencing a depraved mind regardless of human life, be ruled to be murder in the first degree, then this clause fixes a much lower standard of evidential requirement, than do the classes one and three above mentioned. And this is all the more manifest, when we reflect that this clause dispenses with all preconceived purpose to deprive any particular person of life. A blow or injury, unlawfully and intentionally aimed and inflicted on a person, by an act greatly dangerous to life, and actually producing death, under such circumstances as to evidence a depraved mind regardless of human life, could not be inflicted without a preconceived purpose to deprive some particular person of life.— See *McManus v. State*, 36 Ala. 285. The two propositions are incompatible. We think the legislature, in this clause, intended to raise to the high grade of murder in the first degree those homicides which are the result of what is called “universal malice.” By universal malice, we do not mean a malicious purpose to take the life of all persons. It is that depravity of the human heart, which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim. The supreme depravity shown in this so-called universal malice, is considered as the equivalent of the strong adjectives, willful, deliberate, malicious, and premeditated, which characterize the first class of murder in the first degree.

Speaking of murder, Mr. Blackstone, 4 Com. 200, says: “Neither shall he be guilty of a less crime, who kills another in consequence of such a willful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intention to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice.” And we may mention the intentional wrecking of a passenger train on a railroad, by which a life or many lives are destroyed, as another instance of universal malice. The definition given in the statute, of this class, four, brings it precisely within the influence of the principle stated, and shows that this fourth class of murders in the first degree was intended to embrace homicides committed from universal malice.

This provision of our statute was taken substantially, and almost literally, from the New York Revised Statutes. In *Darry v. People*, 2 Park. Cr. Rep. 606, their statute came before the Court of Appeals of that State. Three of the jus-



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tices delivered separate opinions in the cause, and construed the clause as we have done. Five of the seven justices concurred. Able opinions were delivered, two of them by Denio and Selden, J J., conclusively establishing the construction we have above declared. In neither of the classes numbered two, three, four, above, is there a specific intent to take the life of the person slain. The gravity of the offense, in each case, is made up of the wicked act done or attempted, which, without specific intent, caused the death. But the New York statute, as construed in *Darry v. People, supra*, was, in one very important respect, wholly unlike ours. It defined murder as consisting of three distinct classes, and left all other unlawful homicides, as known at the common law, to fall under the general designation of manslaughter. This reduced many common-law murders to manslaughter; and, as was shown in the decision rendered, reduced Darry's crime to manslaughter, when, under the rules of the common law, he was guilty of a most atrocious murder. Our statute is different, first, in making and declaring a larger number of homicides to be murder, and in classifying many of them as murder in the first degree; and, second, in declaring that "every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." So, every killing, which would be murder at the common law, is murder, either in the first or second degree, under our statute. The enumerated common-law murders fall within the first degree. The non-enumerated fall within the second degree.

What we have said above shows that, in the charge given, the Circuit Court misconstrued the fourth subdivision of our statute defining murder in the first degree. The facts and intents supposed in the charge do not amount to what the law calls universal malice; and it follows that, under that fourth class, the defendant could not be guilty of murder in the first degree. But we do not intend to be understood as affirming that, under the facts of this case, the defendant could or could not be found guilty of murder, either in the first or second degree. A homicide, committed by direct force, can not be murder in the first degree, unless there was an intention to kill. The intention is usually found, in the absence of positive proof, from the character of the instrument used, the evidence of contrivance, method, self-possession, deliberation, previous malice, want of provocation. Deliberation need not necessarily be long. The law has laid down no particular duration for the existence of formed design. It is sufficient that it be formed, and not engendered by passion suddenly aroused. If this formed design exist—

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if the killing be willful, deliberate, malicious, and premeditated, then the offense is murder in the first degree. The jury determines this from all the surrounding or attending circumstances. A homicide committed without these ingredients, is not murder in the first degree, within the first or third class.

But there is another step between murder in the first degree and manslaughter. Mere words, no matter how insulting, never reduce a homicide to manslaughter. Manslaughter is the unlawful killing of a human being without malice; that is, as the unpremeditated result of passion-heated blood—caused by a sudden, sufficient provocation. And such provocation can, in no case, be less than an assault, either actually committed, or menaced under such pending circumstances as reasonably to convince the mind that the accused had cause for believing, and did believe he would be presently assaulted; and that he struck, not in consequence of a previously formed design, general or special, but in consequence of the passion suddenly aroused by the blow given, or, apparently, about to be given.

When the fatal blow is given in consequence of passion suddenly engendered by a blow given, or which apparently is about to be given, then another inquiry arises: is the blow given, or about to be given, calculated to produce death, or grievous bodily harm? If it is, and the person thus assaulted has not brought on the difficulty for the purpose, and if he can not otherwise escape the danger, he may strike in self-defense, and continue till he relieves himself of the peril, even to the slaying of his adversary. But, if the blow given, or about to be given, be not such as to endanger his life, or to expose him to grievous bodily harm, as the law defines that term, then a fatal blow struck by him, even from sudden passion, and without formed design, is manslaughter in the first degree. And a killing under circumstances which do not amount to proof of formed design—willful, deliberate, malicious, and premeditated—which is defined above as constituting murder in the first degree, and which is not toned down to manslaughter, or self-defense, as defined above, is murder in the second degree.

We have spoken of formed design as of two classes, general and special. The former is evidenced by carrying weapons likely to produce death, with the purpose previously formed to use them in resentment of any blow that may be received, come from what quarter it may, even though the blow be of a character not endangering life or limb. Such formed design has no particular person as its objective aim. It is aimed at whoever may become an assailant. If prepara-



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tion be made, and the design be formed and executed, by slaying an adversary in resentment or resistance of a blow not likely to produce death, or inflict grievous bodily harm, this savors largely of the extreme wickedness of universal malice, and would be murder; and if such design was formed willfully, and carried into execution pursuant to such formed design, this would be murder in the first degree. On the other hand, if the fatal injury was inflicted in the reasonable belief of impending danger of death, or of grievous bodily harm, shown by present, existing circumstances, this would be self-defense, unless the circumstances show that the difficulty was provoked or brought on by the slayer, to furnish him a pretext or excuse for using a deadly weapon; in which event, the offense would be murder in the first degree. Formed design, special, differs from such design general, only in the fact that it is aimed at, and the injury inflicted on, a particular person had in view. The same rules of criminality *vel non* obtain, as those above declared. It all depends on the nature of the preparation, and the purpose of the formed design. If it be to repel aggressive assault, not provoked, which is calculated to produce a reasonable belief of danger to life, or of grievous bodily harm, this is excused on the doctrine of self-defense. If to resent an insult, or abusive language, an assault or battery that does not endanger life or limb, or an assault provoked for the purpose, no matter how grievous, this is murder. There can be no manslaughter in such a homicide as this; for manslaughter in the first degree is the result of passion suddenly engendered, and without premeditation, from present provocation, but in no case less than an assault. Manslaughter in the second degree is when the homicide results from the commission of a misdemeanor, or civil tort, but which result was not intended or contemplated.

In *Judge v. The State*, at the present term, we discussed the distinction between murder and manslaughter, and do not propose to consider it further at this time. A portion of the charge in that case, not discussed in the opinion of this court, is amenable to the same criticism, and fell into the same error as to the fourth class of murder in the first degree, above pointed out, which is the only error committed in the trial of this cause.

Following what we said in *Ex parte Nettles*, at the present term, we may add, the definition and constituents of the crime of murder have come to us from the common law, that grand, colossal system, which, in the purity and elevation of its morals, the maintenance of right and repression of crime, the equal protection of all in the enjoyment of life, liberty



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and property, challenges the admiration of the world. Our statutes, as we have shown, have classified murders, but in no instance have they reduced a common-law murder to a lesser defense.—See Code of 1876, § 4295. Every murder at common law, is murder under our statutes. If it now requires a higher degree of criminality to secure a conviction of murder than it did at common law, the fault is not in the law. It is in its lax and falsely merciful administration. When the homicide is not shown to be within one of the four classes of murder in the first degree, and yet falls within the definition of murder at the common law, it is murder in the second degree.

The case of *Rex v. Thomas*, 7 Carr. & Payne, 817, bears directly on the question last above discussed. It was tried before Baron PARKE, one of England's profoundest criminal jurists. "The prisoner and prosecutor were at a beer house, together with several other persons. Some words passed between the prisoner and a third person; after which, he was seen walking up and down the passage of the house, with a sword-stick in his hand, with the blade open, and was heard to say, 'If any man strikes me, I will make him repent of it.' He was desired to put up the stick, which he refused to do; and shortly after, the prosecutor, ignorant of what occurred, but perceiving the prisoner was creating a disturbance, struck the prisoner twice with his fist, when the prisoner stabbed him." In charging the jury, the learned Baron said: "If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms 'malice,' in the definition of willful murder, then the offense would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows; there, you could not attribute that act to the passion of anger, and the offense would be murder. And so, if you find that, before the stroke is given, there is a determination to punish any man who gives a blow, with such an instrument as the one which the prisoner used; because, if you are satisfied that, before the blow was given, the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such wound to the passion of anger excited by that blow; for no man who was under proper feelings—none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument."

We entirely concur in these views, which all must admit

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are a correct exposition of the common-law doctrine on this most pernicious practice of wearing weapons, with formed design to use them on an insufficient emergency.

The prisoner in the present case, having been convicted of murder in the second degree, was thereby acquitted of the higher offense of murder in the first degree, and can not, on the next trial, be convicted of a higher crime than murder in the second degree.—*Bell and Murray v. The State*, 48 Ala. 684. The only error shown in the record is in the definition of murder in the first degree, and the defendant was acquitted of murder in that degree. If this were a civil suit, the error would be immaterial, and without injury. But, in a prosecution for an offense of this high grade, we are unwilling to apply the doctrine of error without injury. We can not know what influence the charge may have exerted on the jury.

Reversed and remanded. Let the prisoner remain in custody, until discharged by due course of law.

## Dunn v. The State.

### *Indictment for Murder.*

1. *Change of venue; destruction of certified transcript, and how supplied.*—On change of venue in a criminal case (Code of 1876, §§ 4914-16), if the certified transcript should be lost or destroyed, after it has been filed in the court to which the trial was removed, that court may supply the loss, and substitute another transcript, on proper evidence, as in the loss or destruction of any other paper or record: it is not necessary that the substituted transcript should be made out in return to a *certiorari*, nor that it should be specially certified as the former was: if its truth is not controverted, and the court is satisfied of its correctness, it is sufficient.

FROM the Circuit Court of Walker, on change of venue from Tuskaloosa.

Tried before the Hon. WM. S. MUDD.

The prisoner in this case, John Dunn, was indicted in the Circuit Court of Tuskaloosa, at its November term, 1876, for the murder of Jasper N. Dunn. On his application, at the next May term, 1877, the venue was changed to Walker county; and a certified transcript of the indictment, with the proceedings had in the cause, was filed in the office of the clerk of the Circuit Court of that county, on or about the 1st July, 1877. A short time afterwards, the court-house of that county was burned, and with it said transcript was

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destroyed. At the September term, 1877, on the day appointed for the trial, when the cause was called, the defendant filed three special pleas, on account of certain alleged defects in the certified transcript which, as the pleas assert, had been that day filed in the court, as the transcript on which he was to be tried. The court sustained a demurrer to each of these pleas, and the cause being then continued, at the instance of the defendant, on account of the absence of material witnesses, the minute-entry further proceeds: "Thereupon, comes the solicitor who prosecutes in this behalf for the State, and also comes the defendant in his own proper person, and also by counsel; and in view of the objections made to the transcript now filed in this cause, and to the special pleas pleaded by the defendant, and in order to obviate said objections made to said transcript, and a question arising on said pleas when this cause shall be again called for trial, the said solicitor now moves the court for an order requiring the clerk of the Circuit Court of Tuskaloosa to make out and transmit to this court another transcript in this cause, by the next term of this court; said transcript to be made out, certified, and transmitted, as required by section 4209 of the Revised Code. And it appearing that the said circuit clerk of Tuskaloosa did, on or about the — day of June, 1877, make out and transmit to this court a duly certified transcript in this cause, pursuant to an order of the Circuit Court of Tuskaloosa, made at its Spring term, 1877, by which the venue in this cause was changed to this court; and it further appearing that said transcript was received and filed by the clerk in this court, and that the court-house of this county was afterwards destroyed by fire, and that said transcript, and the papers filed therewith in this cause, were destroyed by the burning of said court-house; it is therefore ordered that the said motion of the solicitor be granted, and that the circuit clerk of Tuskaloosa make out another transcript," &c.

At the next ensuing term, held in March, 1878, the judgment-entry recites the appearance of the parties, and then proceeds thus: "And it being shown to the satisfaction of the court, by due proof, that the clerk of the Circuit Court of Tuskaloosa has, in the manner required by law, transmitted to this court an amended and more perfect transcript of the record and proceedings had in this case in said Circuit Court of Tuskaloosa, duly certified by said clerk, as required by an order of this court made at its last term, which transcript was delivered to the clerk of this court, and by him filed, on the 4th day of March, 1878; the said solicitor now moves the court that said amended and perfected tran-



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script be substituted as the proper transcript in this case, in lieu and in place of the transcript which was transmitted and delivered to the clerk of this court before the last term thereof, and which was on file in this cause at the last term, and that said defendant be held to answer to the copy of the indictment set forth and contained in said amended transcript, and that he be put on his trial on the same; which motion of the solicitor was granted by the court."

The bill of exceptions, taken at that term of the court, states that, "upon the calling of the cause, for the purpose of setting a day for the trial, the solicitor for the State presented the following transcript, as the proper transcript on which to put the defendant on his trial in this court. And said defendant thereupon objected to be tried thereon, because, 1st, he says, that the certificate of the clerk, appended thereto, does not certify that said transcript contains a true and correct transcript of the organization of the grand jury, the indictment, and all indorsements thereon, and the orders of the court made in said cause; and, 2d, because said certificate does not certify that the original subpoenas were contained in the package, nor that they were forwarded or delivered in the same manner as the transcript in said cause." The court overruled these objections, and the defendant excepted. On a subsequent day of the term, being put on his trial, the defendant filed two pleas in abatement, setting up substantially the same grounds of objection to the transcript as above stated; and demurrers to these pleas having been sustained by the court, he went to trial on the plea of not guilty.

Of the two transcripts above mentioned, the first is dated the 28th August, 1877, and is in these words: "I certify that the foregoing pages, numbered from one to eighteen inclusive, contain a full, true, and correct transcript of all the papers and proceedings, together with the orders and judgments of the Circuit Court of Tuscaloosa county, had and made in the above entitled cause, and now recorded in the office of the clerk of said court, which office I now fill. Given under my hand," &c. This transcript was filed in the Circuit Court of Walker on the 1st September, 1877, and so indorsed by the clerk. The certificate appended to the last (or amended) transcript, which is dated the 14th February, 1878, is as follows: "I, John J. Harris, clerk," &c., "hereby certify that the foregoing pages, numbered from one to twelve inclusive, contain a full and complete transcript of all the papers and proceedings on file and of record in my office, in a cause known as *The State of Alabama v. John Dunn*; that said defendant, by application and affidavit, ob-

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tained a change of venue from Tuskaloosa to Walker county, and that the orders of the Hon. Circuit Court concerning the change of venue have been fully carried out. Given under my hand," &c.

S. A. M. WOOD, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, for the State.

BRICKELL, C. J.—The order removing the trial to the Circuit Court of Walker county, having been made and entered of record, by the Circuit Court of Tuskaloosa county, in which the indictment was found, the jurisdiction of the latter court was exhausted; and the jurisdiction of the former attached, when a transcript of the record of the proceedings in the Tuskaloosa Circuit Court was made and certified in conformity to the statute, and delivered to the clerk of the Circuit Court of Walker.—Code of 1876, §§ 4914-16. The subsequent destruction of the transcript, by the burning of the court-house, did not affect the jurisdiction of the Circuit Court of Walker. The transcript had become a record of that court, and the court had power to substitute it, upon proper evidence of its destruction and contents.—*Bradford v. State*, 54 Ala. 230; 1 Bish. Cr. Pr. §§ 1213-14. It was the duty of the clerk of the Circuit Court of Tuskaloosa, on the application of the solicitor, or of any person applying for the same, to make out and deliver a correct transcript, properly certified, of the proceedings had in the cause while it remained in that court, appearing of record, or of papers found on file pertaining to the cause. This transcript, whether certified as the original transcript was, or simply certified, in general terms, to be a full, true, and correct copy of the record, and of the papers on file, became proper evidence of the contents of the original transcript. If its truth was not successfully controverted, the court could, on motion, have ordered its substitution, as and for the original; or, without making the order, could have accepted it on the trial, as evidence of the contents of the original transcript. Rights are not lost—suits in civil causes, and prosecutions in criminal causes, are not terminated—by the loss or destruction of records, or of papers pertaining to the files, while the cause is *in fieri*. The court has the power, and it is its duty, to supply them, on proper evidence of their contents.

The Circuit Court ordered, on the presentation of transcripts from the Circuit Court of Tuskaloosa, certified by the clerk, under the seal of the court, to be full and complete transcripts of all the papers and proceedings on file

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and of record in the cause while in that court, these transcripts containing the organization of the grand jury, the indictments thereon, all the entries relating thereto, should be filed—in other words, should be substituted—for the original transcript, which had been destroyed. It was not necessary the court should have obtained these transcripts by any order, or by a *certiorari* to the clerk of the Circuit Court of Tuscaloosa county. Such an order, or writ, is necessary, only when it is necessary to correct mistakes, or supply omissions, in records already certified to, and of file in the court. Code of 1876, § 4916. The record, mistakes or omissions in which could have been supplied or corrected, had been lost. The power the court was exercising, was not the power to correct mistakes, or supply omissions. It was simply the power to receive legal evidence of the contents of the transcript which had been destroyed. The duty of the court was to require the best evidence of the contents of that transcript the State could produce. A reproduction from the records and files of the Circuit Court of Tuscaloosa, whence the destroyed transcript came, was the best and highest evidence of its contents.—1 Whart. Ev. §§ 135-6. The reproduced transcript, containing everything which the original could have properly contained, and being certified to be full and complete, in the absence of all impeachment of its verity, was properly received, and substituted for the original.

We have carefully examined the record, and there is no error which authorizes a reversal of the judgment of conviction.

Affirmed.

## Cook v. The State.

### *Indictment for Burglary and Grand Larceny.*

1. *Personal presence of prisoner in court on return of verdict.*—In a case of felony, the prisoner has a right to be present in court when the jury return their verdict; which right is not waived by the failure of his counsel to object to the verdict being received in his absence, nor can it be waived by them. If the verdict is received in his absence, it is void; and the error can not be cured, after the jury have been discharged, by immediately re-assembling the jurors, examining on oath those who had left the court-room, and again receiving the verdict in the presence of the prisoner.

2. *Unauthorized discharge of jury.*—The discharge of the jury in a criminal case, after they have rendered their verdict, though it be inadvertently received

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when the prisoner is not in court, and is therefore void in a case of felony, amounts to an acquittal.

FROM the Circuit Court of Greene.

Tried before the Hon. LUTHER R. SMITH.

The indictment in this case contained several counts, charging the prisoner with burglary and grand larceny. There was a general verdict of "guilty as charged in the indictment," and the court thereupon sentenced the defendant to imprisonment in the penitentiary for the term of two years, with an additional term to cover the costs. The circumstances connected with the rendition of the verdict, as stated in the opinion of the court, are copied from the judgment-entry. There is no bill of exceptions in the record.

COLEMAN & McQUEEN, for the prisoner, cited *The State v. Hughes*, 2 Ala. 102; *Sperry v. Commonwealth*, 9 Leigh, 623.

JOHN W. A. SANFORD, Attorney-General, for the State, cited *Brister v. The State*, 26 Ala. 107.

MANNING, J.—The offense with which defendant was charged by the indictment in this cause, is a felony according to section 4095 (3541) of the Code of 1876, because punishable by imprisonment in the penitentiary. In such a case, the defendant is entitled, as a right, to be present at the rendering of the verdict; and if rendered against him during his absence, it is void.—*The State v. Hughes*, 2 Ala. 102; *Sperry v. The Commonwealth*, 9 Leigh, (Va.) 623; *S. C.*, 2 Lead. Cr. Cases, 449.

The record recites that, "upon returning their verdict" [guilty as charged in the indictment] "into court, the jury came in, and handed the clerk the verdict, which was read out in open court, in the absence of the defendant, and the jury discharged. Two of the jurors had left the court-room, all of the others remaining therein, when the court discovered the defendant was not present; whereupon, the court had the jury called together again, within five minutes after they had been first discharged. The two jurors who had left the court-room were sworn, and stated, on oath, that they had had no conversation with any one in regard to the case. The defendant, who had been sent for, was then brought into court. The court then handed the indictment back to the jury, and asked them if that was their verdict; and they replied, that it was. The defendant protested and objected to this action of the court; which protest and objection were overruled, and the verdict was again received and read

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by the court; to which the defendant excepted. The counsel for defendant were present in court when the jury first brought their verdict into court, and did not object to its being received by the court, until after the jury were first discharged." Defendant was then in the custody of the sheriff.

It was not within the authority of prisoner's counsel to waive for him his right to be present when the verdict was delivered.—*Waller v. The State*, 40 Ala. 333; *Young v. The State*, 39 Ala. 358; *Sperry v. Commonwealth, supra*; *Eliza v. The State*, 39 Ala. 694. And if it were, no consent to such a waiver appears by the record.

It seems to have been supposed, that if there was error in receiving the verdict under the circumstances, it was not beyond correction; and therefore the persons of whom the jury was composed, were reassembled about five minutes after they had been discharged; and two of them having been out of the court-room, they were sworn, and under oath declared that they had not conversed with any one in regard to the case. But, if the jury could then be reconstituted, to render a verdict which was the result of former deliberations, why should not the other ten jurors have been also examined under oath, as their companions were? They also could have communicated about the case with persons in the court-house, during the same five minutes after they were discharged; and it was quite as necessary that they should have been purged on this subject, as that the two should be. We think there was no virtue in such an interrogation of any of them.

In *Regina v. Vodden* (6 Cox, C. C. 226; 22 Eng. L. & Eq. Rep. 596; 1 Leading Crim. Cases, 547), "on the trial of a prisoner for felony, a juryman, by mistake, delivered the verdict 'not guilty,' when the jury meant 'guilty.' The prisoner was discharged from the dock; but, some of the jury then interposing, he was immediately brought back again, and the jury was again asked what their verdict was. They said 'guilty;' the prisoner was therefore sentenced." *Held*, that the original mistake was corrected within a reasonable time, and the conviction was right. But there it was the prisoner, not the jury, that was discharged; and this was supposed to have been done in accordance with the verdict. But that error was immediately corrected before any injustice could have been thereby committed. The jury was still in their place, and acting under the sanction of an oath from which they had not been discharged.

In *Brister et al. v. The State* (26 Ala. 108), when the jury returned into court with their verdict, some of the prisoners

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were in the jail; and, without observing this, the verdict was received and read aloud; and the jury, being told by the judge that they were discharged, started out of the courtroom, "but had not got out of the bar," before it was discovered that the prisoners were not present. Whereupon the court immediately informed the jury that they were not discharged; ordered the clerk to hand the papers back to the jury, and had the absent prisoners brought into court. The prisoners objected to the receiving of the verdict then, upon the ground that it had been received and read aloud in their absence, and they had been deprived of their right to have the jury polled. This court denied the validity of the objection, and held that there was no error in this action of the Circuit Court.

We are of opinion that our rulings on this subject should not be extended further in that direction. The jury, in the present case, were discharged, and had dispersed among the audience in the court-house and persons outside. It would be a dangerous precedent, to hold that, after this, the persons who composed that jury could be reassembled as such to render a verdict in a case of which they had been thus discharged.

Let the judgment of the Circuit Court be reversed. And the jury having been discharged without a legal cause, and without rendering their verdict in a legal manner, the defendant must be released from further prosecution.

## Drake v. The State.

### *Indictment for Assault with Intent to Murder.*

1. *Plea of guilty, after former conviction.*—A single criminal act can not be split up into two or more distinct indictable offenses, and prosecuted as such; yet, under an indictment charging an assault with intent to murder, a plea of former conviction of an assault and battery without a weapon having been found in favor of the defendant, if the judgment entry recites that a *nolle-prosequi* was thereupon entered as to the felony charged in the indictment, and that the defendant, "being then put on trial, under said indictment, for an assault and battery with a weapon, by leave of the court withdraws his plea of not guilty, herein before interposed by him, and pleads guilty of an assault and battery with a weapon," he can not complain that a verdict and judgment were thereupon rendered, finding him guilty of an assault and battery.

2. *Whether court or jury fix punishment for misdemeanor.*—On plea of guilty, in cases of misdemeanor, the punishment is fixed by the court (Code of 1876, §§ 4453, 4484), and not by the jury.

FROM the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

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The indictment in this case contained but a single count, which charged that the prisoner, Redmond Drake, "unlawfully, and with malice aforethought, did assault Job Ellis with intent to murder him." The judgment-entry, after reciting the appearance of the parties, &c., proceeds as follows: "The defendant pleads a former conviction, to so much of said indictment as charges an assault and battery on said Job Ellis without a weapon; and the State having joined issue upon said plea, thereupon came a jury," &c., who found the issue in favor of the defendant. "It is therefore considered by the court, that said defendant be discharged from so much of said indictment as charges him with an assault and battery without a weapon. Thereupon, by leave of the court, the solicitor takes a *nolle-prosequi* as to so much of the charge in said indictment which charges said defendant with intent to murder; and thereupon said defendant, being put on trial, under said indictment, for an assault and battery with a weapon, by leave of the court withdraws his plea of not guilty, herein before interposed by him, and, by leave of the court, pleads guilty to the charge of an assault and battery with a weapon. Thereupon, came a jury," &c., who returned a verdict of guilty; and the court thereupon sentenced him to hard labor for the county for ten days, and an additional term for the costs, at the rate of twenty cents per day. There is no bill of exceptions in the record, and no writ of error; but the judgment-entry recites, that the defendant "appealed to the Supreme Court."

SNEDECOR & COCKRELL, for the prisoner.—Under the indictment, as framed, the defendant might have been convicted of a simple assault, an assault and battery, or an assault with intent to murder. When the prosecuting attorney had entered a *nolle-prosequi* as to the felony charged, and the plea of former conviction had been sustained as to the charge of an assault and battery, there remained nothing to which the plea of guilty could apply. The record thus presents the case of a plea of guilty, followed by a judgment and sentence, in the absence of any charge whatever against the defendant. Such a judgment can not be sustained. When the indictment charges no offense, a plea of guilty amounts to nothing. That a person can not be twice tried and punished, as for two separate offenses, growing out of one and the same transaction, see *The State v. Johnson*, 12 Ala. 840; 33 Ala. 419; 40 Ala. 716. Besides, the defendant ought to have been discharged on the verdict, which did not impose any punishment whatever on him.—Rev. Code, §§ 3685, 3806, 4170; 30 Ala. 14.

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JOHN W. A. SANFORD, Attorney-General, for the State.

STONE, J.—The indictment in the present record is sufficient, under our statute. It charged the defendant with an assault with intent to commit murder. That feature, which charged the murderous intent, was *noll-prossed*, and defendant's plea of former conviction of assault and battery without a weapon was found in his favor. In this condition of the record, it is possible that, on a plea of not guilty, in continuation of the former conviction, the defendant could not have been found guilty. The law does not permit a single, indivisible act, to be divided, so as to make out of it two distinct indictable offenses. "The decisive test is, that the same testimony will support both charges."—*State v. Johnson*, 12 Ala. 840.

But, in this case, the defendant pleaded guilty of an assault and battery with a weapon. The question of guilty or not guilty was not before the court or jury. The only open question was the *quantum* of punishment. It would be a novelty in criminal jurisprudence, for the record to disclose a plea of guilty, and a judgment, with or without verdict, that the defendant was not guilty. But the present record makes a stronger case than this. The recital in the judgment-entry is, "Thereupon, the said solicitor, by leave of the court, takes a *nolle-prosequi* as to so much of the charge in the said indictment which charges said defendant with intent to murder; thereupon said defendant, being put on trial, under said indictment, for an assault and battery with a weapon, by leave of the court withdraws his plea of not guilty, herein before interposed by him, and, by leave of the court, pleads guilty to the charge of an assault and battery with a weapon." We think this record justifies us in holding, that by leave of the court, the solicitor abandoned the felonious charge in the indictment, on an agreement and understanding that the defendant would plead guilty of the lesser offense, included therein, an assault and battery with a weapon, but without the felonious intent; and that the plea of guilty was but the consummation of the agreement thus made, with the knowledge and sanction of the court. There is nothing in this assignment of error.

2. There is nothing in the argument that, after the plea of guilty, the jury alone could impose the punishment, in cases of misdemeanor.—Code of 1876, §§ 4453, 4484.

There is no error in the record, and the judgment of the court is affirmed.

[Atkins v. The State.]

## Atkins v. The State.

### *Indictment against Retailer of Spirituous Liquors.*

1. *Statement of time in indictment.*—In an indictment for selling spirituous liquors to a person of known intemperate habits, "not having at the time the requisition of a physician that the same was for medical purposes," it is sufficient to allege that the offense was committed before the finding of the indictment, without a more definite statement of the time.

2. *Oath of petit jury.*—A recital in the judgment-entry, in a criminal case, that the jury were sworn "well and truly to try the issue joined," &c., sufficiently shows that the oath prescribed by law (Code of 1876, § 4765) was administered to them. (Overruling *Murphy v. The State*, 54 Ala. 178, as "inadvertently made.")

3. *Burden of proof as to requisition of physician.*—Under an indictment for selling spirituous liquors to a person of known intemperate habits, without the requisition of a physician, the *onus* is on the defendant to show that he had such requisition, and not on the prosecution to prove the want of it.

4. *Proof of known intemperate habits.*—In order to show that the defendant had knowledge of the intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is permissible for the prosecution to prove that said person was accustomed to drink daily, frequently, and openly, to a state of intoxication, in the town in which the defendant lived, of liquor there obtained from the defendant and others.

5. *Competency of witnesses as jurors.*—Persons who have been summoned and sworn as witnesses for the prosecution in a criminal case, are not competent to serve as talesmen, and may be challenged for cause; and the error of putting them on the jury, against the defendant's objection, is not cured by the failure to examine them as witnesses in the case.

FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case, which was found in October, 1877, charged that the defendant, John H. Atkins, "before the finding of this indictment, did sell or give spirituous, vinous, or malt liquors to James McFadden, a person of known intemperate habits, the said McFadden not having at the time the requisition of a physician that the same was for medical purposes." The defendant demurred to the indictment, and the court overruled the demurrer; but the record does not show what grounds of demurrer, if any, were specified. "On the trial," as the bill of exceptions states, "after the State and the defendant had challenged certain of the regular jurors for the week, the sheriff, was ordered by the court to summon a sufficient number of talesmen to complete the jury; and he thereupon summoned, with others, W. D. Lee, John H. Webb, and W. C. Tunstall, who had previously been called and sworn as witnesses for the State in said case.

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The defendant had then exhausted five peremptory challenges, and he challenged said three talesmen respectively, before they were sworn, for cause, on the ground that they had been called and sworn as witnesses for the State in said cause; which objections and challenges were overruled and disallowed by the court, and the defendant excepted. Afterwards, the defendant having peremptorily challenged W. C. Christian, another talesman summoned as aforesaid, and the jury had been completed by summoning N. B. Jones to supply the place of said Christian, the court allowed the said challenge for cause as to said W. C. Tunstall, and allowed the defendant an additional peremptory challenge as to said N. B. Jones; which was made by the defendant, and another person summoned in his place." The bill of exceptions further states, that "none of the jurors who had been sworn as witnesses were examined by either party."

"Frank Johnson, a witness for the State, being sworn, testified as follows: 'I knew James McFadden in his life-time.' Question by the solicitor: 'Did you ever see the defendant sell or give him any spirituous, vinous, or malt liquors, in the town of Greensboro, within twelve months prior to the finding of the indictment at this term?' Answer: 'Yes, I have seen the defendant sell him whiskey frequently within that time.' Question by the solicitor: 'How often have you seen him sell said McFadden whiskey in that time?' Question objected to by the defendant, on the ground that the State had not, up to this time, made an election, and because the evidence sought to be elicited was impertinent, irrelevant, illegal, and calculated to mislead the jury; which objections were overruled by the court, and defendant excepted. Answer: 'Frequently: a dozen times, or more.' The defendant then asked that the State should be required to elect the time and act upon which the State relied for a conviction in this case; but the court permitted the solicitor to proceed without then electing, against the objection of the defendant, and the defendant excepted. The solicitor then asked said witness, if he knew of any time when the defendant did so sell to McFadden; to which the witness replied, that on one occasion, when he and McFadden were going to a tournament at Demopolis, McFadden bought two bottles of whiskey at defendant's drug-store; that he thought Charles Atkins drew the whiskey, and defendant wrapped up the bottles, and gave them to said McFadden, and that he did not remember that any thing was said about selling it for medicinal purposes. The solicitor stated, before asking the last question, that he did not intend to elect as to the time the witness would name, unless the witness would also state

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that nothing was said at the time about selling it for medicinal purposes. After the witness had answered said question, the defendant insisted, and moved the court, that the State should be held to have elected the time of said tournament; which motion the court overruled, and the defendant excepted. The solicitor then asked said witness, 'Do you know of any particular time, within the last twelve months, when defendant sold said McFadden whiskey, when nothing was said in reference to its being used for medical purposes;' to which the witness answered, that he had often seen defendant so sell whiskey to said McFadden, but could not name any particular time, and could not say whether anything was said about its being for medical purposes. Question by the solicitor: 'Was said McFadden in the habit of drinking spirituous, vinous, or malt liquors?' Answer: 'Yes.' Question: 'Give the places where he usually drank these liquors.' Answer: Sometimes at his room, sometimes at defendant's drug-store, and sometimes at other places.' Question: 'Did he drink daily?' Objected to by defendant; objection overruled, and defendant excepted. 'Did he drink secretly or openly?' Objected to by defendant; objection overruled, and defendant excepted. 'He drank openly.' 'Do you know how many drinks per day he took?' 'No.' 'Do you know how much whiskey McFadden has bought from defendant, for his own use, within the last twelve months?' 'I have no idea, but know he bought a good deal.' The last two questions were objected to by defendant; which objections were overruled, and he excepted. Said witness also stated, on cross-examination, that said McFadden's name was James M. McFadden. The witness having been then discharged, the defendant moved the court to hold the State to the election of the time of said tournament; which motion the court overruled, and the defendant excepted.

"James W. Locke, a witness for the State, testified: 'I know James McFadden; he drank whiskey.' Question by solicitor: 'Did he go for any considerable length of time without drinking?' Objected to by defendant; objection overruled; exception by defendant. Answer: 'I do not think he did, though I can not say.' Question: 'Do you know where he usually drank, prior to the 1st August last?' Answer: 'Most usually, I think, at the defendant's.' Question: 'Do you know of any time, within the last twelve months, when defendant sold or gave said McFadden spirituous, vinous, or malt liquors, without anything being said about its being for medical purposes?' Objected to by the defendant, on the ground that the evidence sought to be elicited was illegal, irrelevant, and calculated to mislead the jury; which



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objections were severally overruled, and defendant excepted. Answer: 'Once in that time. In June last, when witness, C. E. Waller, Judge Hobson, and said McFadden were going on a fishing expedition, witness saw McFadden purchase a half-gallon jug of whiskey from defendant, and did not hear anything said about its being for medical purposes.' The solicitor then announced that he elected this expedition as the time and act relied on for a conviction.

"A. J. Hamilton, a witness for the State, testified; 'I am the marshal of the town of Greensboro, and know James McFadden.' Question: 'Was he in the habit of using spirituous, vinous, or malt liquors?' Objected to by defendant; objection overruled, and defendant excepted. Answer: 'Yes.' 'Do you know said McFadden's character as to temperance or intemperance?' 'Yes.' 'What was that character?' Objected to by defendant; objection overruled, and defendant excepted. Answer: 'He was a very intemperate man.' 'Did you ever see him under the influence of whiskey?' 'Yes; very frequently: when on a spree, nearly every day for a week.' Said witness stated, on cross-examination, that he considered a man intemperate, when he drinks enough whiskey to violate the common rules of propriety. Thomas Cowin, another witness for the State, testified that he knew said McFadden, and knew his habits; and that he was in the habit of drinking whiskey. He was asked, 'Do you know what said McFadden's character was in this community, prior to the 1st August last, and within twelve months prior to that time?' The defendant objected to this question, but his objection was overruled by the court, and he excepted. The witness answered, 'He had the character of a drinking man.' L. J. Lawson, another witness for the State, was asked, 'Do you know what character said McFadden bore in the community as a temperate or intemperate man?' The defendant objected to this question; the court overruled his objection, and he excepted. The witness answered, 'He had the character of an intemperate man.' The State here closed. On the part of the defendant, Dr. Peterson testified that, once during the past summer, he had given said McFadden a requisition as physician for whiskey, and thought it was on election day.

"The foregoing was all the evidence in the case, and the court thereupon charged the jury," among other things, "that if McFadden had the certificate or requisition of a physician to get whiskey, that is purely a matter of defense, and must be shown by the defendant, and it is not incumbent on the State to show that the defendant sold the whiskey without a requisition: that in order to avail the defendant in



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this case, he must show that he knew of such requisition, and sold him whiskey upon it." To this charge the defendant reserved an exception.

THOS. R. ROULHAC, for the prisoner.

JOHN W. A. SANFORD, Attorney-General, for the State.

MANNING, J.—The indictment is not demurrable, because it does not specify the precise time when defendant sold spirituous liquors to a person of known intemperate habits, without requisition of a physician. In a prosecution for the similar offense of selling to a minor, without the consent of his parent or guardian, in the form of the indictment which the statute prescribes as the proper one, the time of committing it is not specified. Rev. Code, p. 811, No. 31.

2. It has been repeatedly decided, that a judgment-entry, which sets forth that the jury were sworn "well and truly to try the issue joined," sufficiently shows that they had taken the lawful oath, and was not to be understood as reciting the oath that was administered, and showing it to be different from that prescribed by law.—*Moore v. State*, 52 Ala. 424; *McNeil v. State*, 47 Ala. 498; *The State v. Pile*, 5 Ala. 72. A contrary decision, inadvertently made, in *Murphy v. The State*, 54 Ala. 176, is overruled.

3. The court correctly ruled, that it devolved on a defendant who was indicted for selling spirituous liquors to a person of known intemperate habits, without the requisition of a physician, to show that he had such requisition, if he relies on it for his defense. A ruling similar to this was made in the case of such a sale to a minor without the consent of the parent or guardian.—*Farrell v. The State*, 32 Ala. 559; *Greenleaf on Ev.* (8th Ed.) § 79.

4. Evidence is admissible, in a prosecution under such an indictment, that the person alleged therein to be of known intemperate habits, was accustomed to drink daily, frequently, and openly, to a state of intoxication, in the town in which defendant lived, and of liquors obtained of defendant and others there, in order to show that the accused knew that such person was of known intemperate habits.

5. The court below erred, in not allowing defendant's challenges for cause, to the jurors summoned as talesmen by the sheriff, and who had been subpoenaed and sworn as witnesses for the State in the cause. A person, under indictment, is entitled to a public trial by an impartial jury; and they are not to be regarded as unbiased who have such a

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knowledge of the transaction, out of which the prosecution arises, as to be able to testify to matters which tend to show him guilty.—*Fleming v. The State*, 11 Ired. 236; *Commander v. The State*, at this term. The fact that they are not examined in the cause as witnesses, makes no difference.

For this error, the judgment must be reversed, and the cause remanded.

## Harris v. The State.

### *Indictment for Larceny of Part of Growing Crop.*

1. *Statement of time in indictment*—In an indictment, found in April, 1876, for the larceny of part of a growing crop, it is not necessary to allege that the offense was committed after the passage of the act (February 20, 1875) creating and punishing such offense.

2. *Ownership of stolen property; variance between averment and proof*.—Under an indictment for the statutory offense of larceny of part of a growing crop (Code of 1876, § 4358), if the ownership of the crop is laid in one person, a conviction can not be had on proof that it belonged to him and another person jointly: the statute (*Ib.* § 4800) in reference to the averment and proof of ownership of “personal property,” in criminal cases, does not apply to such an indictment, since a growing crop is not personal property.

FROM the Circuit Court of Hale.

Tried before the Hon. GEORGE H. CRAIG.

The indictment in this case, which was found in April, 1876, contained but a single count, which charged that the defendant “feloniously took and carried away a part of an outstanding crop of corn, the property of Pleasant W. K. Stringfellow.” “On the trial,” as the bill of exceptions states, “the State introduced evidence tending to show that, within twelve months before the finding of the indictment, and in said county of Hale, the defendant did steal a part of an outstanding crop of corn, which belonged jointly to P. W. K. Stringfellow and one Daniel Gee. The proof showed that the land belonged to certain heirs, of whom said Stringfellow’s wife was one; but said Stringfellow occupied the land, and farmed on shares with the said Daniel Gee. This was all the evidence in the cause; and the court thereupon charged the jury,” in effect, that a conviction might be had on this proof, and that the variance was immaterial. The defendant excepted to this charge, and requested the court to instruct the jury, “that, if they believed the evidence, they

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must find the defendant not guilty ;" which charge the court refused to give, and the defendant excepted to its refusal.

THOS. J. SEAY, for the defendant, contended, 1st, that the variance between the averment and proof of ownership was not cured by the statute (Code of 1876, § 4800), which applies only to "personal property," and does not include a growing crop, which is a part of the realty; and, 2d, that the indictment is fatally defective, in not alleging that the offense was committed after the 20th February, 1875.

JOHN W. A. SANFORD, Attorney-General, for the State.

STONE, J.—The present indictment is framed under the amendment of section 3706, Rev. Code, found on page 260, Acts of 1874-5; Code of 1876, § 4358. The indictment pursues the statute strictly, and is sufficient. This statute created a new offense, of very high grade, out of an act which, by the common law, was only a trespass. Growing or out-standing crops are part of the freehold, and, before this statute, were not the subject of larceny; which consisted of feloniously taking and carrying away the personal goods of another.—4 Black. Com. 229, 232.

2. At common law, it was necessary that the proof of the ownership of property, alleged to be stolen, should correspond with the averment in the indictment.—2 Bish. Cr. Proc. § 722; *Parmer v. The State*, 41 Ala. 418; *Davis v. The State*, 17 Ala. 415. Section 4800, Code of 1876, declares that, "when any personal property, upon or in relation to which the offense was committed, belongs to several partners or owners, it is sufficient to allege the ownership to be in any one or more of such partners or owners." This statute relates to personal property; and, as we have shown above, an outstanding crop is not personal property. The statute has no application to the present case.

The variance between the indictment and proof was such a misdescription of a material matter therein stated, as to require an acquittal on the indictment as now framed.—See Code of 1876, §§ 4816-7.

Reversed and remanded. Let the prisoner remain in custody, until discharged by due course of law.



[Adams v. The State.]

**Adams v. The State.***Indictment for Larceny of Cow.*

1 *Statement of value and time in indictment.*—In an indictment for the larceny of a cow, found in April, 1877, it is not necessary to aver the value of the animal, nor that the offense was committed after the 20th February, 1875; since the statute approved on that day (Code of 1876, § 4358) makes the offense grand larceny without regard to value, and a prosecution for petit larceny, committed before that day, would be barred by the statute of limitations.

FROM the Circuit Court of Hale.

Tried before the Hon. GEORGE H. CRAIG.

The indictment in this case was found at the April term, 1877, and contained but a single count, which charged that Henry Adams and Emanuel Black, "before the finding of this indictment, feloniously took and carried away a cow, the personal property of Albert Marcey." Henry Adams, being on trial alone, demurred to the indictment—"1st, because the value of the property alleged to have been stolen is not alleged; and, 2d, because the indictment does not allege that the offense was committed before or since the passage of the act of February 20, 1875." The court overruled the demurrer, and the defendant then pleaded not guilty. The verdict of the jury was, "Guilty as charged in the indictment;" and the court thereupon sentenced the defendant to hard labor for the county for two years, and an additional term to cover the costs, at the rate of fifteen cents per day.

THOS. J. SEAY, for the defendant.—As an indictment for petit larceny, or larceny committed prior to the passage of the act of February 20, 1875, an averment of the value of the animal was indispensable to its validity; and as an indictment for grand larceny under the act of February 20, 1875, an averment that the offense was committed after that day was equally indispensable. Under a general verdict of guilty, the court could not know what judgment to render. For analogous cases, see *Harris v. The State*, 50 Ala. 127; *McIntyre v. The State*, at the last term.

JOHN W. A. SANFORD, Attorney-General, for the State.—A conviction could only be had, under the indictment, under the act approved February 20, 1875; and under that act no averment of value is necessary, since the offense is grand

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larceny without regard to value.—*Sheppard v. The State*, 42 Ala. 531-2.

MANNING, J.—Defendant demurred to the indictment, because it charged him with having stolen a cow, without specifying any value, or averring that the offense was committed after the statute of February 20, 1875, making the offense grand larceny without regard to value. In cases of larceny, an allegation of the value of the property stolen is generally essential, in order that the record may show what penalty the court has authority to adjudge against the offender, upon his pleading “guilty,” or upon the rendition of a verdict of “guilty” against him. And in the case of an offense, for which the penalty has been increased by a recent enactment, it is advisable, and may in some instances be necessary, to allege also that it was committed since the statute went into operation.—See Bish. on Cr. Pro. (2d ed.), §§ 77, 538 *et seq.*; *The State v. Garner*, 8 Port. 447; *Sheppard v. The State*, 42 Ala. 531. In all the forms for indictments in cases of larceny, furnished by our several Codes, the averment of value is contained. But, where the grade of the crime does not depend upon the value of the thing stolen, it is not always necessary that this value should be alleged in the indictment.—1 Bish. Cr. Pr. § 567; *Sheppard v. The State*, *supra*; *Clark v. People*, 1 Scammon, 117; *Lopez v. The State*, 20 Texas, 780. And under the statute of February 20, 1875, the stealing of cattle is made grand larceny without regard to value. Hence, an indictment, not alleging such value, may be good.

It is supposed, however, since this was not so until the passage of the act of February, 1875, that an indictment, which does not contain that averment, ought to allege that the offense was committed after the statute went into operation; else it cannot be known by the record, upon a verdict of “guilty,” whether the offense was petit or grand larceny. The answer to that is, the defendant could not be indicted in the spring of 1877, for a petit larceny committed two years before. This is prohibited by the statute, which bars prosecutions for misdemeanors after one year.—Code of 1876, § 4644 (3952). And a conviction under the present indictment must, therefore, necessarily be of the offense of grand larceny, under the act of 1875, the penalty for which is prescribed by law.

We are of opinion that the demurrer to the indictment was properly overruled.

Let the judgment of the Circuit Court be affirmed.

[Allison v. The State.]

## Allison v. The State.

### *Indictment against Defaulting Overseer of Public Road.*

1. *Appointment of overseer of public road; infancy as disqualification.*—The appointment of a person, who is at the time under twenty-one years of age, as an overseer of a public road (Code of 1876, § 1632), is not void: his minority is a personal exemption, which he may either claim or waive.

2. *Excuse or resignation of overseer.*—When a person has been regularly appointed as an overseer of a public road, and has been notified of his appointment, he can only relieve himself of the duties and responsibilities of the position, by rendering his excuse for not accepting, or for resigning after acceptance, in the manner prescribed by the statute (Code of 1876, § 1644).

FROM the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

The indictment in this case contained but a single count, which charged that the defendant, Charles Allen, “an overseer of a public road in said county, failed to discharge his duty as such overseer.” The defendant pleaded his infancy at the time of the appointment, in bar of the indictment; to which the State replied, that he accepted and acted under the appointment. The defendant demurred to this replication, and the overruling of his demurrer is the only matter now urged as error.

SNEDECOR & COCKRELL, for the defendant, contended that the appointment of an infant, as overseer of a public road, was a nullity: that the statute was imperative, and limited the power of appointment to persons between the ages of twenty-one and sixty.

JOHN W. A. SANFORD, Attorney-General, for the State. Infancy is a personal privilege, which may be either claimed or waived by the person appointed. After acceptance of the appointment, he can not be heard to set up his infancy, or other personal exemption, to avoid its duties and burdens, or to escape the penalties incurred by his negligence.—1 Bishop’s Criminal Procedure, §§ 409–22.

STONE, J.—The indictment in this case was found at the Fall term, 1876. The offense charged must have been committed before that time. Hence, the act “to amend section 1323 of the Revised Code,” approved December 7, 1876



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(Pamph. Acts, 93), has no bearing on this case. That statute constitutes section 1632 of Code of 1876.

Section 1323 of the Revised Code directs, that "the court of county commissioners must, at its first term in every second year, . . . appoint . . . an overseer for each road precinct; such overseers must be between the ages of twenty-one and sixty years."

Section 1331: "The copy of the order appointing overseers must contain a description of his precinct and grade of the road, and be accompanied by a statement of the names of the apportioners of the election precinct or precincts through which any part of the road assigned him passes."

Section 1333: "The sheriff must, within thirty days after the delivery to him of such copies and statements, deliver a copy of each to the . . . overseers, if practicable, and, if not, leave the same at their residence, and return the original, with his indorsement of service, to the judge of probate."

Section 1334: "A service of the copy of such appointments and statements, although not made within the time prescribed, is valid from the time of service."

Section 1335-6: "Any person appointed . . . overseer, may send his excuse for not accepting, or the reasons for resigning, which reasons must be stated, and must be sworn to."

Section 1337 provides, that "the judge of probate, with the concurrence of the court of county commissioners, may pass upon the sufficiency of such excuse or resignation; . . . and if [they] shall consider such excuse or resignation insufficient, and such overseer shall neglect or refuse to act under his appointment, he shall be subject to indictment, and fined not less than twenty, nor more than fifty dollars, if found guilty."

The single question presented by this record arises as follows: The defendant pleaded, in bar of the prosecution, that he was under twenty-one years of age at the time of, and would be so under age during the whole term of his appointment. The State replied, "that when the defendant was appointed overseer of said road, as mentioned in said indictment, he accepted said appointment, and that he continued to act as such overseer, until after the default charged in the indictment, without refusing to act as such overseer, or asking to be relieved of such appointment." The Circuit Court overruled a demurrer to this replication.

We think the Circuit Court did not err in this ruling. It is the manifest policy of the statute, that there shall, at all times, be overseers of the public roads. That the appointee

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was under twenty-one years of age, was a personal exemption to him, which he could assert or waive. It did not render the appointment void. The statute points out in what manner an appointed overseer may render his excuse for not accepting, or for resigning after he has accepted.—See Revised Code, §§ 1335–6. We hold, in view of the public welfare, that this is the only mode by which an overseer of a public road, who has been regularly appointed and notified, can relieve himself of the duties and responsibilities of the position. But this case is even stronger than this. The replication charges that the defendant accepted the appointment, and acted under it, until the indictment was found. He thus prevented a vacancy, and the appointment of another in his stead. He must be held to have waived his right of exemption.

The judgment is affirmed.

## Daniels v. The State.

### *Indictment for Trespass after Warning.*

1. *Misnomer*.—A misnomer, in a criminal case, can only be taken advantage of by plea in abatement: if the defendant stands mute when arraigned, and the plea of not guilty is thereupon entered for him by the court (Code of 1876, § 4870), he can not take advantage of a misnomer disclosed by the evidence.

2. *Competency of prosecutor as witness, when entitled to fine*.—On a prosecution for trespass after warning (Code of 1876, §§ 4419–20), the prosecutor is a competent witness for the State, though entitled to the fine on conviction. (*Northcot v. The State*, 43 Ala. 330, asserting a different principle, declared overruled by statute.)

FROM the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

The defendant in this case was indicted, by the name of George Daniels, for a trespass on the premises of Sebert Jordan, “after having been warned, within six months preceding, not to do so.” He stood mute when arraigned, and the court thereupon entered the plea of not guilty for him. On the trial, as appears from the bill of exceptions, the court allowed said Sebert Jordan, the owner of the premises trespassed upon, to testify as a witness for the prosecution. The defendant objected to the competency of said Jordan as a witness, on the ground of interest, and reserved an exception to the overruling of his objection. The defendant proved that his true name was George W. Daniel, and not

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*Daniels*; and the court thereupon charged the jury, that such misnomer did not authorize an acquittal; to which charge, also, the defendant excepted.

THOS. J. SEAY, for the defendant, cited *Northcot v. The State*, 43 Ala. 330; *Humphrey v. Whitten*, 17 Ala. 30.

JOHN W. A. SANFORD, Attorney-General, for the State, cited Code of 1876, § 4870; *Hall v. The State*, 53 Ala. 634; *Edmondson v. The State*, 17 Ala. 179; *Clark v. The State*, 3 Ala. 378.

MANNING, J.—When a person under indictment is not correctly named, he must take advantage of the error by plea in abatement, and in the plea state what the true name is; for, if he does not do this, he will be conclusively holden to be the person in the indictment mentioned.—1 Bishop's Crim. Pro. § 677. He can not relieve himself from this consequence by refusing to plead at all. If, on being arraigned, he "refuses or neglects to plead, or stands mute, the court must cause the plea of not guilty to be entered for him."—Code of 1876, § 4870 (4169). The appellant, in this cause, was, moreover, defended by counsel; and a bill of exceptions, made out and signed for him, is in the record; and since it contains no evidence that defendant stood mute from infirmity, it is probable he waived the right to plead misnomer. upon the advice of his counsel. Whether he did or not, he must be holden to be the person who was intended to be accused of the charge in the indictment.

2. The indictment charges that defendant trespassed upon the premises of the prosecutor, Sebert Jordan, within six months after having been warned not to do so; a statutory offense, for which the fine, not exceeding \$100, is to go to the prosecutor whose premises were trespassed upon; and Jordan was allowed by the court to testify as a witness in the cause, against the objection and exception of defendant. This action of the court is assigned as error. We consider the question thus raised as settled adversely to the defendant by the case of *Hall v. The State*, 53 Ala. 634. Section 4410 of the Code of 1876 was probably intended to overturn the different decision in *Northcot v. The State* (43 Ala. 330), and abolish an exception thereby set up to the general rule.

Let the judgment of the court be affirmed.



[Sandy v. The State.]

## Sandy v. The State.

### *Indictment for Obtaining Money under False Pretense.*

1. *Sufficiency of indictment.*—An indictment for obtaining money under a false pretense, which pursues the form given in the Code (No. 48, p. 996), is sufficient.

2. *Obtaining money by false pretense; what constitutes.*—To constitute the offense of obtaining money under a false pretense (Code of 1876, § 4370), it is not necessary that the money should be paid directly to the defendant: it is sufficient if it was paid to another at his request, and in payment of his debt.

3. *Competency of prosecutor as witness.*—On a prosecution for obtaining money or property by false pretenses, the person defrauded is a competent witness for the State.

FROM the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

The indictment in this case contained three counts, which charged that the defendant, Greene Sandy, "did falsely pretend to Andrew J. Arrington that he had" (or "had and owned") "a sow and pigs, and, by means of such false pretense, obtained from the said Andrew J. Arrington eleven dollars," or "ten dollars," or "eleven dollars and ninety cents." There was no demurrer, or other objection to the indictment, so far as the record shows. "On the trial," as the bill of exceptions states, "the State introduced as a witness Andrew J. Arrington, the person named in the indictment as the person from whom the money was alleged to have been obtained, and proposed to prove by him the facts upon which the State claimed a conviction in this case. The defendant objected to his competency as a witness, on the ground that, in the event of a conviction, he would be entitled to recover judgment for the value of the money so alleged to have been obtained. The court overruled the objection, and the defendant excepted. Said Arrington then testified that, within twelve months before the finding of the indictment, one Archer, a constable, had an execution against the defendant, from a justice of the peace in Gainesville, for fine and costs amounting to \$11.90, and was about to levy it on a sow and pigs which were in the defendant's possession; that said defendant was then laboring on his (witness') farm, making a crop, and the sow and pigs were worth more than the amount of the execution; that the defendant, representing that the sow and pigs were his, and

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did not belong to his wife, and that there was no lien on them, proposed to witness to pay the fine and costs, and take the sow and pigs; that he (witness) agreed to do so, and would not have done so but for said representations; that thereupon, the next day, when the constable came down, in the defendant's absence, witness paid him ten dollars in money, for which the constable then gave him a receipt, and they agreed that the balance (\$1.90), which was costs, should be settled between them on settlement of their individual accounts, as the constable owed witness; that said balance was so settled between them afterwards, and the defendant had never been bothered with the execution since. Said witness further stated, that he told the defendant to keep the hogs there on the place for him; that he afterwards observed, towards the close of the year, that the defendant was wasting and removing his share of the crop, and, fearing he would not be reimbursed from the crop for his advances during the year, he went to see where the hogs were, and applied to the defendant for them; and that the defendant thereupon denied that he had made said arrangement with witness about the hogs, and declared they did not belong to him, but to his wife, who was living with him. The said constable was then introduced as a witness, and testified to the payment of said ten dollars to him by said Arrington, and the settlement of the balance between them, as stated by Arrington. It was proved, also, that when Arrington applied to defendant for the hogs, as above stated, his wife claimed them as her own, in the presence of the defendant, and he conceded her claim, and said that they belonged to her. This was all the evidence tending to show defendant's guilt; and upon this evidence, the defendant requested the court, in writing, to charge the jury, that if they believed, from the evidence, that he never in fact received the money, alleged to have been obtained by him under false pretenses, they must acquit him. This charge the court refused to give, and the defendant excepted to its refusal." The court charged the jury, in substance, that if they believed the evidence above stated, they must find the defendant guilty; to which charge, also, the defendant excepted.

SNEDECOR & COCKRELL, for the defendant, contended that a conviction could not be had for obtaining money under a false pretense, when the proof only showed that he had procured the settlement of a debt with another person.

JOHN W. A. SANFORD, Attorney-General, for the State,

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cited *Commonwealth v. Drew*, 19 Pick. 179; *People v. Haynes*, 11 Wendell, 557; *People v. Herrick*, 13 Wendell, 87; *Commonwealth v. Harley*, 7 Metc. 462; *Cowen v. People*, 14 Illinois, 348; *Franklin v. The State*, 52 Ala. 414.

STONE, J. 1.—The indictment in this case pursues the form in the Code literally, and must be adjudged sufficient.—See Form 48; *O'Connor v. The State*, 30 Ala. 9.

2. The statute (Code of 1876, § 4370) enacts, that "Any person who, by any false pretense, or token, and with intent to injure or defraud, obtains from another any money, or other personal property, must, on conviction, be punished as if he had stolen the same." The proof in this record tends to show that the money, charged in the indictment to have been obtained by force of the false pretense, was not paid to the prisoner, but to another, in payment of the prisoner's debt, and at his request. The court was asked to charge the jury, that this did not meet the requirements of the statute. This view of the statute is too narrow and technical. If the prisoner procured the money to be paid to another, in extinguishment of his own debt, it is the same, in fact and law, as if the money had been first paid to him, and by him to the creditor. The gist of the offense—the practical wrong—lies in inducing another to part with something valuable, by knowingly representing as true that which is false; such representation being made for the prisoner's advantage, and with intent either to injure or defraud the person to whom the representation is made.—See authorities on the brief of the Attorney-General.

3. The person defrauded by the representation is a competent witness for the State.—*Hall v. The State*, 53 Ala. 634; 1 Whar. Amer. Cr. Law, § 778.

The judgment of the Circuit Court is affirmed.

## Lavender v. The State.

### *Indictment for Larceny of Hog.*

1. *Averment and proof of ownership of stolen property.*—When husband and wife are living together, and the husband has possession of personal property belonging to the wife, it may be described as his in an indictment for larceny.

2. *Description of animal stolen.*—A pig, four or five months old, may be described as a hog, in an indictment for larceny.

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[Lavender v. The State.]

FROM the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

The indictment in this case charged, that the defendant, Frank Lavender, *alias* Frank Jackson, "feloniously took and carried away a hog, the personal property of Hal Lide." "On the trial," as the bill of exceptions states, "the evidence for the State tended to show that the defendant feloniously took and carried away a pig, the property of the wife of said Hal Lide, who was then living with his said wife, and was in possession of said pig, in said county; and that the pig was at that time between three and five *weeks* (?) old, weighed between twenty and forty pounds, and was worth from two to four dollars. This being all the evidence in the case, the defendant requested the court, in writing, to charge the jury—1st, that if the animal stolen was a pig, not more than four or five months old, the defendant can not be convicted of grand larceny; 2d, that if the animal stolen belonged to the wife of Hal Lide, they must find the defendant not guilty." The court refused each of these charges, and instructed the jury, in effect, that if they believed the evidence, they must find the defendant guilty; to which charge, as well as to the refusal of the charges asked, the defendant duly excepted.

No counsel appeared in this court for the defendant, so far as the record and docket show.

JOHN W. A. SANFORD, Attorney-General, for the State.

MANNING, J.—A hog, the property of a married woman, living with her husband, who has possession of it, is not incorrectly described, in the indictment for stealing it, as the property of the husband.—*Davis v. The State*, 17 Ala. 415. And a pig, four or five months old, is a *hog*, within the meaning of section 4358 (3706) of the Code of 1876, making it grand larceny to steal any "hog, sheep, or goat," &c.—See *Parker v. The State*, 39 Ala. 365.

Let the judgment be affirmed.

[Drake v. The State.]

## Drake v. The State.

### *Indictment against Defaulting Witness before Grand Jury.*

1. *Sufficiency of indictment in description of process.*—An indictment which charges that the defendant, “having been regularly subpoenaed or summoned to appear as a witness before the grand jury, to answer as to any gaming within his knowledge, did fail or refuse to attend and testify in obedience to such summons, without a good excuse” (Code of 1876, §4136), is fatally defective on demurrer: it should contain a substantial description of the subpoena or summons and its service, as in the analogous case of resisting an officer in the execution of legal process.

2. *Excuse for default; by whom determinable, and charge as to.*—When a defaulting witness before the grand jury is proceeded against by indictment for a misdemeanor, the facts on which he relies as an excuse must be proved to the satisfaction of the jury, but the court must determine, as matter of law, whether they constitute a sufficient excuse; and a charge which refers the decision of this question to the jury, is erroneous.

FROM the County Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

The indictment in this case was found by a grand jury of the Circuit Court, at its Spring term, 1877; and the case was transferred to the County Court, under the provisions of the act approved February 9, 1877.—Session Acts 1876-7, p. 149. The indictment contained but a single count, which charged that the defendant, “having been regularly subpoenaed or summoned to appear as a witness before the grand jury, to answer as to any gaming within his knowledge, did fail or refuse to attend and testify in obedience to such summons, without a good excuse; against the peace,” &c. After a mistrial in the case, the defendant demurred to the indictment, assigning as grounds of demurrer—1st, that the facts alleged do not constitute any offense; 2d, that the indictment does not allege the year in which, nor the term at which, the defendant was required to appear before the grand jury; 3d, that it does not show that the supposed offense is not barred by the statute of limitations. The court overruled the demurrer, and the defendant then pleaded not guilty. On the trial, as appears from the bill of exceptions, the State introduced evidence showing that, at the same term at which the indictment was found, the defendant was summoned as a witness before the grand jury, to testify as to any gaming within his knowledge, and that he failed to attend; and the defendant introduced evidence tending to show that he had been afflicted with asthma for several years,

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and that he had a severe attack of it during said term of the court. On this evidence, the court charged the jury, "that if the evidence showed that the defendant had been regularly subpoenaed to attend and testify before the grand jury of Madison county at its last Spring term, and failed to do so, and if he had shown no good and sufficient excuse for his failure to attend, then they must find him guilty; but, if they considered his excuse a good and sufficient one, then they must find him not guilty." To this charge the defendant excepted. The overruling of the demurrer to the indictment, and the charge to the jury, are now urged as error.

J. D. WEEDEN, for the defendant.—The indictment does not contain a sufficient description of the offense intended to be charged.—*United States v. Cruikshank*, 2 Otto, 558; *Seay v. The State*, 3 Stew. 131; *Doyle v. The State*, 49 Ala. 28. The sufficiency of the excuse was a matter to be determined by the court.—Rev. Code, § 3579. The charge of the court was, therefore, erroneous.

JOHN W. A. SANFORD, Attorney-General, for the State.

BRICKELL, C. J.—The indictment is founded on section 4136 of the Code of 1876, which declares a witness failing or refusing, without a good excuse, to be determined by the court, in obedience to a summons, to appear before the grand jury, and testify as to any gaming within his knowledge, is guilty of a contempt, and also of a misdemeanor. There is no averment in the indictment of the character of the summons issued to the defendant, nor by whom, or what authority it was issued, nor by whom, or when it was served, nor when it was returnable. The offense is of the same character as that of resisting process; and an indictment for it, according to the rules of pleading at common law, would have been fatally defective, unless it averred the issue of a summons by proper authority, with a proper description of it, the time of its return, and service by a proper officer.—2 Bish. Cr. Pr. §§ 891-93. The statutes have changed the common-law rules of criminal pleading, dispensing with many averments which were regarded as indispensable, reducing indictments rather to a statement of legal conclusions than of facts. Forms of indictments for many offenses are given, which are declared sufficient in all cases to which they are applicable; and it is further declared that, in other cases, analogous forms may be used.—Code of 1876, § 4824. A form is prescribed for resisting an officer in executing process, which states the officer, and contains a mere general



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description of the process, stating its character, and the officer or authority issuing it. If the present indictment had stated, and thereby shown, that the summons issuing to the defendant was issued by an officer having authority to issue it, and the officer by whom it was served, it would have conformed substantially to the form of indictment for the analogous offense of resisting process, and would have been sufficient. Without these averments, it is insufficient. A witness is not bound to obey any other than a legal summons, legally served; and until the issue and service of such process is averred and proved, the court can pronounce no judgment against him. The County Court should have sustained the demurrer.

2. The statute authorizes a proceeding against the delinquent witness for a contempt, and for a misdemeanor. If the proceeding is for a contempt, the court, without the intervention of a jury, hears the evidence, and pronounces judgment. Of necessity, if the witness offers an excuse, the court must then determine its sufficiency—in the words of the statute, whether it is a good excuse. The affidavit of the witness may then be received, or the court may examine him orally. But, when the witness is proceeded against by indictment for a misdemeanor, he has a right to a trial by jury; and of that trial the indispensable elements are, that the court must adjudge the law, and the jury render a verdict on the facts. The defendant cannot, by his own affidavit, or his oral examination, testify as to any fact. The excuse on which he relies, if he makes any, must be proved by witnesses. The jury determine, as matter of fact, whether it is proved: but, whether the facts relied on are, as matter of law, a sufficient excuse, the court must determine. The County Court erred, in referring to the jury a question of law, which it should have decided—what was a sufficient excuse for failing or refusing to obey the summons to appear before the grand jury.—1 Brick. Dig. 337, § 25.

The judgment must be reversed, and the cause remanded. The prisoner must remain in custody, until discharged by due course of law.

[Callahan et al. v. The State.]

## Callahan et al. v. The State.

### *Scire Facias against Bail, on Forfeited Recognizance.*

1. *Order for bail, on petition for habeas corpus.*—When an application for bail is made to a circuit judge in vacation, “he may fix the amount of bail required, and authorize the sheriff to take bail accordingly” (Code of 1876, § 4849); and on application for *habeas corpus*, by a person arrested under a *capias* after indictment found for murder, praying to be admitted to bail, presented to a circuit judge while holding court in another county of his circuit, accompanied with the written consent of the solicitor that he be admitted to bail in a specified sum, an order directing the sheriff to discharge him, on his giving bond with surety in the sum named, will be held valid under this statute, although granted without any return to the writ, or any hearing under it, and without the presence of the prisoner; and a recognizance taken by the sheriff, pursuant to its terms, will also be held valid.

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APPEAL from the Circuit Court of Blount.

Tried before the Hon. LOUIS WYETH.

This was a *scire facias* on a forfeited recognizance, or undertaking of bail, entered into by Jefferson Callahan as principal, and by the other obligors as his sureties, by which they agreed to pay the State of Alabama five thousand dollars, “unless the said Jefferson Callahan appears at the next term of the Circuit Court to be held for said county of Blount, and from term to term thereafter until discharged by law, to answer the State of Alabama of a charge of unlawfully and with malice aforethought killing William Graves, by shooting him with a gun or pistol.” The recognizance was dated the 16th October, 1874, and was taken by the sheriff of said county, under an order made by Hon. W. J. HARALSON, the presiding judge of the fifth judicial circuit, which includes the county of Blount. His order is copied in the opinion of the court, and the facts on which it was based are also stated in the opinion. At the ensuing March term, 1875, said Callahan having failed to appear, a conditional judgment was rendered against him and the other obligors; and a *scire facias* on this judgment was regularly issued and served. At the return term of the writ, the defendants appeared, and moved the court to set aside the judgment *nisi*, to dismiss the *scire facias*, and to quash the recognizance, or undertaking of bail. The grounds on which these motions were founded were—1st, that said recognizance was taken by the sheriff of said county, without any legal power or authority whatever; 2d, that it was taken and

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approved by the sheriff under an order made by Judge Haralson on a petition for *habeas corpus*, "which said order was made in the absence of said Callahan, and without any power or authority of law;" 3d, that said order was made while Judge Haralson was presiding in the Circuit Court of Jackson, in the absence of said Callahan, and without any return to the writ of *habeas corpus*; 4th, that said undertaking of bail was taken and approved by the sheriff "without any authority under the constitution and laws of Alabama;" 5th, "that said supposed undertaking of bail was not taken or approved by any officer authorized by law to take or approve the same." On the hearing of these motions, the defendants read to the court the petition for *habeas corpus*; the order of Judge Haralson indorsed on it; the letter from the solicitor to Judge Haralson consenting that bail be allowed in the sum of \$5,000, and the indictment under which the petitioner was arrested and confined. It was admitted that, "when the petition for *habeas corpus* was sued out, and when it was presented to Judge Haralson, then presiding in the Circuit Court of Jackson county, and acted on by him, and when the undertaking of bail was signed by said Callahan, he was under arrest, and in actual confinement in the jail of Blount county." On these facts, the court overruled the several motions; to which the defendants excepted. The defendants then craved oyer of the recognition, the order under which it was taken, and the petition for *habeas corpus*, and pleaded, "in short by consent," 1st, "that said supposed undertaking of bail was not taken and approved by any officer having authority or power to take and approve the same;" 2d, that said order was made by Judge Haralson while presiding in the Circuit Court of Jackson county, without having issued any writ of *habeas corpus* as prayed, and without any return on such writ, or any examination into the matters prayed in the petition, and in the absence of said Callahan, and without any legal excuse being shown for his absence, and said order was never entered on the minutes of said Circuit Court of Jackson county; 3d, *nul tiel record*; 4th, that said Callahan, being arrested and imprisoned under an indictment for murder, presented his petition in writing for *habeas corpus* to Judge Haralson, "whereupon the said W. J. Haralson, judge as aforesaid, without having issued any writ of *habeas corpus*, or order requiring the sheriff to bring the body of said Callahan before him, upon the consent and agreement of the solicitor of said county, and in the absence of said Callahan, without giving him an opportunity to be heard on his said petition, either in person or by counsel, ordered the sheriff of said



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county,' without specifying any particular county, to discharge the said Callahan from custody, on his giving bond and security in the said sum of \$5,000, conditioned as the law directs; and afterwards, under and by virtue of said supposed order, made as aforesaid," the sheriff of Blount county took the said undertaking of bail, without any legal power or authority. The court sustained a demurrer to each of these pleas, and rendered judgment final against all of the defendants, except several who successfully pleaded *non est factum*.

The overruling of the several motions, and the judgment on the demurrer to the pleas, are now assigned as error.

S. F. RICE, HAMILL & DICKINSON, and JOHN W. INZER, for the appellants.—After indictment found for a felony, the defendant may be admitted to bail in either one of two ways, if the offense be bailable: either on application for bail, in term time or vacation, under sections 4160 and 4241 of the Revised Code, which must be construed together as *in pari materia*; or by proceedings under petition for *habeas corpus*, as provided for by sections 4260 *et seq.* in another chapter. The modes of proceedings are entirely distinct, and the prisoner may elect which he will pursue; and no court or officer can deprive him of this right of election, nor exercise it for him. In this case, the prisoner made his election, and filed his petition for *habeas corpus*, which was under oath, and in due form of law; and his petition was presented to an officer authorized to grant the writ.—Rev. Code, §§ 4260–66. It was the duty of that officer to issue the writ, and require the petitioner to be brought before him; and on the return of the writ, the prisoner also being brought before him, or a statutory excuse shown for the failure to produce him, to examine into the cause of his detention. If, on such hearing, "it appears that he is charged with a public offense which is bailable, he must be admitted to bail, on offering sufficient bail; and if sufficient bail is not offered, the amount of bail required must be indorsed on the warrant, and the court to which he is required to appear; and he may be afterwards discharged by the sheriff of the county, on giving sufficient bail in the amount so required."—Rev. Code, § 4282. The record shows an entire disregard of, and radical departure from, these wholesome statutory provisions. There was no return to the writ, no hearing, no examination into the causes of the prisoner's detention; the writ asked for was not even issued, and the prisoner was not brought before the judge. In his absence, without a hearing, or an opportunity to be heard, and without any examination of

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witnesses, the judge acts on the *ex-parte* suggestion of the solicitor, and makes the order under which the supposed recognizance is afterwards taken by the sheriff. Such a disregard of established forms, involving a denial of substantial rights, can not receive the sanction of this court.—*Windsor v. McVeigh*, 3 Otto, 282; *Gibson v. The State*, Boston Law Reporter, April, 1878, p. 445; *Ex parte Mahone*, 30 Ala. 49; *Ex parte Burnett*, 30 Ala. 461; *Galpin v. Page*, 18 Wallace, 370; Smith on Statutes, § 667; *Capron v. Van Noorden*, 2 Cranch, 126; 1 Wallace, 252; 2 Dowl. Pr. 616; 4 Porter, 345.

If the order of the judge is to be considered as made on the petition for *habeas corpus*, it is void. The statute requires it to be “indorsed on the warrant, with the court to which he is required to appear;” and the reason is, “that the efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe-keeping of the prisoner is entirely under the direction and control of the court.”—Hurd on *Habeas Corpus*, 324; *Barth v. Clise*, 12 Wallace, 400; *In re Kaine*, 14 Howard, 134; 5 Modern, 22; 1 Vent. 330–46. If it is to be considered as made on an application for bail, it is equally void; because it purports, on its face, to be an order of the Circuit Court of Jackson, a court which had no jurisdiction of the case, since the indictment was pending in Blount county, and the prisoner was there confined in jail; and because it was not entered on the minutes of the court.—*Hudson v. Hudson*, 20 Ala. 364. If the order is void, the undertaking of bail is equally void. Bonds, or undertakings, for the appearance of accused persons in criminal cases, are valid “only when taken in pursuance of law and the order of a competent court or officer.”—*United States v. Horton’s Sureties*, 2 Dillon, 94; *United States v. Goldstein’s Sureties*, 1 Dillon, 413; *United States v. Rundlett*, 2 Curtis, C. C. 45.

In his petition, the prisoner asked for an order “admitting him to bail, in manner and form as the law in such cases directs, and that he may have such *other relief* as the law in such cases directs, and he may be entitled to in the premises.” Can this court say, or judicially know, that he was not entitled to be discharged? And if he was only entitled to bail, can this court say, or judicially know, that \$5,000 was not “excessive bail?” The constitution secures to him the “right to be heard by himself and counsel;” declares that he shall not be deprived of “life, liberty, or property, but by due process of law;” that he shall not be arrested or detained, “except in cases ascertained by law, and according to the forms which the same has prescribed,” and that “excessive bail shall not in any case be required.” Of these

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substantial rights, in violation of express constitutional provisions, he has been deprived by the order of the court, on which this proceeding is founded. No presumptions are to be indulged against him or his sureties, because the undertaking was given as required. He was in custody, and deprived of his liberty, and could only regain his liberty by complying with the illegal order; and the sureties may well have signed the undertaking under legal advice that it was worthless. No waiver or acquiescence on his part can be implied, to justify or cure such radical departure from prescribed forms and established modes of procedure, in matters affecting his liberty, and involving great principles of public policy.—*State v. Wilson*, 50 Indiana, 487; 19 Amer. R. 719; *Prine v. Commonwealth*, 18 Penn. St. 103; *Andrews v. The State*, 2 Sneed, 550; *Jackson v. Commonwealth*, 19 Grattan, 656; *Slocovitch v. The State*, 46 Ala. 227.

Suppose Judge Haralson, instead of making this order in the first instance, had notified the prisoner of his intention to make it without giving him a hearing; would not this court, on his petition, have granted a *mandamus* or prohibition against it?

JOHN W. A. SANFORD, Attorney-General, for the State. The order of Judge Haralson was not made by the Circuit Court of Jackson, although that court was then in session: it was the act of the judge, and not of the court, and it was not necessary that it should be entered on the minutes of the court. It is evident that an examination was waived, and the amount of bail fixed by agreement; and these things were done in the interest of the prisoner, and for his favor and accommodation. He might lawfully waive these privileges; and having waived them, and obtained his discharge by the waiver, neither he nor his sureties can now complain of it.—1 Bishop's Crim. Law, 6th ed., §§ 995-6; 1 Bishop's Crim. Pro. § 117.

STONE, J.—One of the most vital principles of *Magna Charta* declares, that 'no man shall be taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land.' In 1679, the *habeas corpus* act was enacted by the British Parliament, to furnish a sure and speedy remedy for every subject of the realm who was unlawfully deprived of his liberty. The Constitution of the United States, Art. I, sec. 9, subd. 2, ordains, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The Constitution of Alabama, Declaration of Rights, § 18,



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declares, "that the privilege of the writ of *habeas corpus* shall not be suspended by the authorities of this State." These cherished rights, so earnestly and perseveringly preserved in our organic law, have been made efficient by every legislative help, which an inbred love of personal liberty could from time to time suggest; so that now it is morally impossible that any citizen can be long restrained of his liberty, except by due course of law. And *habeas corpus*, by reason of the dignity of its office, has long since come to be styled the "Writ of Liberty."

The object of the writ of *habeas corpus* is, that a citizen, who is imprisoned, or otherwise restrained of his liberty, may have a judicial investigation of the cause of his imprisonment—that he be restored to liberty, if confined without authority of law; and, if legally held, that he be admitted to bail, if his offense be bailable. This is the full measure of personal rights, which this great writ guarantees to every citizen.

Jefferson Callahan had been indicted by the grand jury of Blount county, for murder. Under a *capias*, issued by the clerk for his arrest, the sheriff had arrested him, and he was confined in jail to answer to said charge of murder, so found by the grand jury. Imprisoned under such charge, so found, no court was authorized to set him at liberty, unless on bail bond, or, possibly, on some other ground, not claimed or presented in this record. To be allowed to give bail, and then go at large, was, in his then condition, the highest hope he could entertain. He presented his petition to the judge of that circuit, at chambers, praying for the writ of *habeas corpus*. The prayer of his petition was, "that on the final hearing of the same, your Honor will be pleased to make an order admitting him to bail in the manner and form as the law in such cases directs." He did not ask to be enlarged, except on bail, and did not aver he was illegally restrained of his liberty. The petition conformed to the statute, and entitled the petitioner to the writ.—Code of 1876, §§ 4936-7-8, 4940. If the writ had been granted, and the prisoner brought before the circuit judge, that officer would have heard the evidence, and, if it appeared the prisoner was charged with a public offense which was bailable, he would have admitted him to bail, on his offering sufficient bail; and if sufficient bail was not then offered by the prisoner, it would have been the duty of the circuit judge to indorse on the warrant the amount of bail required, and the court to which the prisoner was required to appear; and, in such case, the prisoner may be afterwards discharged by the sheriff of the county,

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on giving sufficient bail in the amount so required.—Code of 1876, § 4958; also, § 4957.

The petition of the prisoner for *habeas corpus*, mentioned above, was brought to the notice of the circuit judge, while he was holding the Fall term of the Circuit Court of Jackson county, in 1874. Accompanying the petition was the written consent of the solicitor of Blount county, addressed to the circuit judge, in which he said, "I am willing that bail may be fixed at \$5,000. Considering his standing, and the magnitude of the crime charged against him, I think that amount very reasonable." The circuit judge indorsed on the petition for *habeas corpus* the following order:

"Circuit Court, Jackson county, Ala., Fall term, 1874. Comes the solicitor of Blount county, and by consent agrees that the petitioner, the said Thomas J. Callahan, be admitted to bail in the sum of five thousand dollars (\$5,000), and waiving an investigation. The sheriff of said county will discharge the defendant from custody, upon his giving bond and security in the sum of five thousand dollars, conditioned as the law directs."

(Signed) "W. J. H———,  
"Judge of the Circuit Court."

These papers—petition of the prisoner, with the judge's indorsement thereon, and the consent of the solicitor—were filed in the office of the clerk of the Circuit Court of Blount county; and thereupon, the sheriff took and approved the bail-bond, which corresponds substantially with the statute, and with the order of the circuit judge.

We have several decisions, made under our former statutes—the one mentioned above included—on the authority of which it is contended, that the bail-bond in the present record was taken without authority of law, and, consequently, the judgment must be reversed.—See *Butler v. Foster*, 14 Ala. 323; *Governor v. Jackson*, 15 Ala. 703; *Hale v. The State*, 24 Ala. 80; *Arnold v. The State*, 25 Ala. 69; *Antonez v. The State*, 26 Ala. 81. See, also, *Nat Gray v. The State*, 43 Ala. 41. We think it doubtful whether the present judgment should be reversed, if it stood alone on sections 4957-8 of the Code of 1876; for it is questionable if the prisoner must not be regarded as having obtained the order for bail, and given his bond, under proceedings in *habeas corpus*. The order gave him all he asked, or was entitled to, even if there had been a trial on *habeas corpus* before the judge, and a decision favorable to his wishes.—See section 4958, Code of 1876. The concession and waiver of the solicitor were made in the interest of the prisoner, and relieved him of delay, if not of expense and trouble. But we need not decide this.

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All our decisions cited above, except that of *Nat Gray's case*, were made before the enactment of the statute herein-after copied, and under the principles found in the chapter on bail in criminal cases, in the Code of 1852, page 643. A later statute enacts, that "circuit and city judges may, during term time, by order entered on the minutes, fix the amount of bail required in all cases ofailable felonies pending in the court, and direct the sheriff to take bail accordingly in vacation; and in like manner, when an application for bail is made to any judge or chancellor in vacation, such judge or chancellor may fix the amount of bail required, and authorize the sheriff to take bail accordingly."—Code of 1867, § 4241; Code of 1876, § 4849. The section above is independent of the provision for bail on *habeas corpus*—section 4958—and is found under the head of "Bail in criminal cases." The last clause of this section expressly authorizes an application to be admitted to bail, to be made to any judge or chancellor in vacation, and empowers such judge or chancellor to fix the amount of bail, and authorize the sheriff to take the bond. The petition for *habeas corpus* was virtually an application to be admitted to bail; for, being imprisoned under an indictment for murder, bail was the highest benefit and privilege the law allowed him to have. This fully justified, and will uphold, as strictly legal, the order made by the circuit judge, and the bond taken by the sheriff thereunder.

The rulings in the several cases of *U. S. v. Goldstein*, 1 Dillon, 413; *U. S. v. Horton*, 2 Dill. 94, and *U. S. v. Rundlett*, 2 Curtis, 41, resting, as they do, on the illegality of the several bail-bonds, and proceedings under them, are not opposed to the views above.

Judgment of the Circuit Court affirmed.

## Horton v. The State.

### *Indictment for Burglary.*

1. *Description of building burned; alternative averments.*—In an indictment for burglary, a count which describes the building burned as "a barn or stable," or as "a barn, house, or building," is fatally defective on demurrer.

FROM the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

The indictment in this case contained three counts; the



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first charging that the defendant "did willfully set fire to or burn a barn or stable of James I. Jones and Willis Blankenship, within the curtilage of the dwelling-house, or other building;" the second describing the house as "a barn, house, or building, the property of" said Jones and Blankenship; and the third, "a barn or stable, the property of" the same persons. The defendant moved to quash the second and third counts, and also demurred to them, but on what grounds the record does not show. The demurrer and motion were both overruled, and a trial was had on issue joined on the plea of not guilty. There was also a motion in arrest of judgment, but not on account of any defects in the indictment. The overruling of the motion in arrest of judgment, the refusal of several charges asked, to which exceptions were reserved, and the allowance of eight peremptory challenges to the State, as shown by the bill of exceptions, are now assigned as error.

H. HUMPHREY, and GEO. S. GORDON, for defendant.

BRANDON & JONES, with JOHN W. A. SANFORD, Attorney-General, for the State.

BRICKELL, C. J.—The indictment is insufficient in each count. In the first count, the building burned, or to which fire was set, is described as a *barn* or *stable*; in the second, as a *barn*, *house*, or *building*; in the third, as a *barn* or *stable*. We have no statute which authorizes such disjunctive averments, and it is plain the common law does not tolerate them.—*Norton v. State*, 53 Ala. 488.

The judgment must be reversed, and the cause remanded; but the prisoner will remain in custody, until discharged by due course of law.

## Overton v. The State.

### *Indictment for Burglary.*

1. *Judicial notice of counties.*—This court takes judicial notice of the names of all the counties in the State, and knows there is no county named *Wadison*.

2. *Caption of indictment.*—The caption of an indictment is that entry of record showing when and where the court was held, who presided as judge, the venire, and who were summoned and sworn as grand jurors; and this general caption, which is a part of every indictment, though not required to be

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included in the copy served on the prisoner in a capital case, may be referred to, to supply a defect in the name of the county, in the special caption or heading at the commencement of any particular indictment.

3. *Judicial notice of grand jury and indictments.*—The grand jury is a component part of the court by which it is organized, and its presentments, regularly returned and filed, become a part of the proceedings of the court itself; of which, consequently, the court will take judicial notice at the term at which they are so returned and filed.

4. *When appeal lies.*—A criminal case can not be brought to this court by appeal, on bill of exceptions, while a motion for a new trial is pending, the judgment being suspended until the decision of the motion.

FROM the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

The indictment in this case was found at the Fall term, 1877; was signed by the solicitor, returned to the court, regularly indorsed as required by the statute, and marked by the clerk, "Filed in open court this 24th November, 1877." In the preparation of the indictment the solicitor had used a blank form partly printed, the names of the State and county being printed in "*German Title*," or "*Eureka Text*," as it was called by the printer, who was examined as a witness on the trial; and by mistake of the printer, as he testified, the name of the county was printed *Wadison*, instead of *Madison*, the two initial letters closely resembling each other in that kind of type. The defendant attempted to take advantage of this mistake, by a motion to quash the indictment, by demurrer, and by plea in abatement. The grounds of the motion were thus stated: "1. Because said indictment fails to show in what county in Alabama the same was found. 2. Because it fails to show that it was found by a grand jury of Madison county. 3. Because it does not contain, in the caption or body thereof, the name of the county in which the same was found. 4. Because the caption shows that said indictment was found by a grand jury of a county not in Alabama. 5. Because the court has no jurisdiction of an indictment found by the grand jury of *Wadison* county." The grounds of demurrer were specified in the same words, and they were also used in the plea in abatement. The court overruled the demurrer and the motion to quash, and sustained a demurrer to the plea in abatement; to which several rulings exceptions were reserved by the defendant. The defendant then pleaded not guilty, and a trial was had on issue joined on that plea, which resulted in a verdict of guilty. The defendant afterwards moved for a new trial, on the same grounds as before specified; which motion was continued by the court until the next term, and it was ordered "that judgment be suspended until the decision of said motion."

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NICH. DAVIS, for the defendant.—The statute imperatively requires that the name of the county shall be stated in every indictment, either in the caption, or in the body thereof.—Code of 1876, § 4784. The court judicially knows the names of all the counties in the State, and must know there is no county named *Wadison*.—*Reeves v. The State*, 20 Ala. 33. If the name of Jackson had been used in the indictment, whether purposely or by mistake, it can not be doubted that the defect would be fatal; and the same rule must be applied to the statement of any other name.

JOHN W. A. SANFORD, Attorney-General, for the State.

MANNING, J.—Objection was made in this cause to the statement of the county, in the margin, or at the head of the indictment. The names therein of the State and county are printed in German characters; and the German letters *M* and *W* are so much alike, that one may be easily mistaken for the other. It therefore happens, that what was intended to be, and looks to an American like the name *Madison*, is in fact "*Wadison*," which proves that it would be better, in getting up all such documents, that the characters of our own language only should be employed.

If there were a county named *Wadison* in this State, we might, perhaps, be bound to consider it the county intended in the present indictment. But we judicially know that there is not. Is the indictment, therefore, void?

"The caption of an indictment is that entry of record, showing when and where the court is held, who presided as judge, the venire, and who were summoned and sworn as grand jurors; and this caption is applicable to, or is a part of every indictment, and need not be again repeated in any part of the indictment."—*Reeves v. The State*, 20 Ala. 33; *Morgan v. The State*, 19 Ala. 558; *State v. Murphy*, 9 Porter, 487; *Perkins v. The State*, 50 Ala. 154. At least, this part of the record, though not such a portion of the indictment as that it must be included in the copy thereof which is required by law to be served on a prisoner about to be tried, is so connected with, and so appertains to it, that it may properly be referred to as showing in what court, at what term, by what grand jury, and in what county, the presentment was made. But, even this reference is not necessary, when the trial takes place in the court, and at the term, when and where the indictment was found. For, the grand jury is, *quodammodo*, a part of the court, and its constitution, presentments, and findings are entered and preserved in the records of the court, as portions of its own proceedings, of which it conse-



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quently has a knowledge of its own. It is only when a cause is transferred to another court, that a transcript of those preliminary proceedings, constituting the caption of the indictment, need to be made and certified.—*Kirk v. The State*, 6 Mo. 471; *People v. Jewett*, 3 Wend. 322; *Duncan v. The State*, 1 Scam. 457.

The grand jury that found this indictment having therefore been a part of the Circuit Court of Madison county, sworn into office before it, and its foreman appointed by the judge thereof, and having come into it in a body and presented this indictment, indorsed and signed by their foreman, "a true bill;" and this bill having been received as such from them, by the judge and clerk, the court cannot but know, from its own cognizance of the facts, that the word written or printed "Wadison," should be read Madison. The defendant, too, being summoned, or arrested and brought into the Circuit Court of Madison county, to answer there to an indictment against him, when it is shown to, or a copy of it is served upon him, is necessarily advised that it is to a presentment of a grand jury of that court and county that he is required to answer; since it could not, under our constitution, be sent from the court of another county into that, except with his consent.

Section 4784 (4111) of the Code of 1876 enacts, that "an indictment must contain, in the caption or body thereof, the name of the State, county and term, in and at which it is preferred." And a brief form is given on page 991, of such a caption; which ought always to be used. But this does not hinder the more solemn setting forth of those same things, as in this instance they are set forth, in the record of the proceedings which, as we have seen, constitutes the more formal caption to the indictment, from being a sufficient compliance with the provisions quoted from section 4784. We hold that the indictment in this cause is sufficient, and should not be quashed.

There is no final judgment, though, in this cause, from which an appeal could be taken; and the appeal itself must be dismissed.

[Pickett v. The State.]

## Pickett v. The State.

### *Indictment for Burglary.*

1. *Alternative averments in indictment.*—When an indictment, or a count in an indictment, charges several distinct offenses in the disjunctive, each alternative averment must be sufficient to justify a conviction.

2. *Sufficiency of indictment, in description of house entered.*—An indictment for breaking and entering a store-house, “in which goods, merchandise, or other valuable thing, was kept for use,” &c., is fatally defective on demurrer; it should describe the “other valuable thing,” so that the court may determine whether it falls within the statute, and the prisoner be informed of the charge against him.

FROM the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

The indictment in this case contained two counts; the first charging that the prisoners “broke into and entered the store of W. T. Barham, in which goods, merchandise, or other valuable thing, was kept for use, sale, or deposit, with intent to steal;” and the second, that they broke into and entered the “store-house” of said Barham, “in which goods, merchandise, or other valuable thing, was kept for use,” &c., as in the first. The defendants demurred to each count of the indictment, “because it does not show what said ‘other valuable thing’ was;” and the overruling of this demurrer is the matter here insisted on as error.

WALKER & SHELBY, for the prisoners, cited *Dwarris on Statutes*, 2d ed., 621; *Bishop on Stat. Crimes*, 245; *Horton v. The State*, at the present term.

JOHN W. A. SANFORD, Attorney-General, for the State, cited *Ward v. The State*, 50 Ala. 120; *Wicks v. The State*, 44 Ala. 398; *Mason & Franklin v. The State*, 42 Ala. 543.

STONE, J.—We think the demurrer to each count of the indictment in this case should have been sustained. Each count charges separate and distinguishable offenses, in the disjunctive; and to sustain the indictment, each disjunctive phase of the charge must contain sufficient averments to justify a conviction. The language of the indictment is, that the defendants “broke into and entered the store of William T. Barham, in which goods, merchandise, or other

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valuable thing, was kept for use, sale, or deposit, with intent," &c. The words "*goods*" and "*merchandise*," each, specify a chattel or chattels, and are sufficiently descriptive and specific, without more. Hence, an indictment using these words, or either of them, would be sufficient; and such indictment need not aver that the goods or merchandise had any value. The law assumes they are valuable, and dispenses with such averment.

The other clause of the statute, and of the indictment in this record, which follows the statute, stands on a different principle. Its language is, "other valuable thing." We have held that, when the chattel alleged to be in the house, in which a burglarious entrance is charged, is something other than goods or merchandise, it must be averred that such 'other thing' was of value.—See *Norris v. The State*, 50 Ala. 126; *Hurt v. The State*, at last term, 1876; *Rowland v. The State*, same term; *Crawford v. The State*, 44 Ala. 382. So, we hold that the 'other thing' must be described by name, or in some other way, for two reasons; first, that the court may determine whether the thing or things are of a class which falls within the statute; and, second, that the prisoner may be informed whereof he is charged.—See *State v. Raiford*, 7 Por. 101; *Johnson v. The State*, 32 Ala. 583.

This case does not fall within the principle declared in section 4794 of the Code of 1876; for this is not a case where "a statute creating or defining an offense, uses special or particular terms;" in which "an indictment on it may use the general term which, in common language, embraces the special term."

Reversed and remanded. Let the prisoners remain in custody, until discharged by due course of law.

## Moody v. The State.

### *Indictment against Retailer of Spirituous Liquors.*

1. *Former acquittal, and not guilty; practice in pleading.*—When issue is joined on the pleas of former acquittal and not guilty, the former issue should be first tried and decided, and it is irregular to submit both issues to the jury at the same time; but, in a case of misdemeanor, if the two pleas are interposed together, and the defendant goes to trial on both at the same time, without objection, this is a waiver of the irregularity; yet, if the jury find a verdict of guilty, and fail to pass on the special plea, the judgment of conviction will be reversed.

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FROM the Circuit Court of Jackson.

Tried before the Hon. LOUIS WYETH.

The indictment in this case charged the defendant with retailing spirituous liquors without a license. At the trial, as the judgment-entry recites, "comes also the defendant, in his own proper person, who, upon hearing the indictment read, pleads, in short by consent, former acquittal, and not guilty; upon which pleas issue is joined by the State, and both pleas are submitted to the jury at the same time." Thereupon came a jury, &c., who returned a verdict of guilty, but did not pass on the other plea; and the court thereupon rendered judgment against the defendant for fifty dollars, besides costs.

No counsel appeared for the defendant in this court, so far as the docket and the transcript show; and there is no brief on file.

JOHN W. A. SANFORD, Attorney-General, for the State.

MANNING, J.—In *Dominick v. The State* (40 Ala. 680), upon an indictment for obtaining goods by false pretenses, "on the trial the defendant pleaded, in short by consent, former acquittal, and not guilty; upon which pleas issue was joined by the State, and both pleas [issues] were submitted to the jury at the same time." This is precisely what was done in the cause now before us. The court said: "The defendant who pleads the two pleas together, thus tendering the two issues together, and goes to trial upon them together, without objection, must be presumed, in such a case as this, to waive the irregularity. What our ruling would be, in a case of felony, we do not decide." This is a case of misdemeanor only.

But, the court held that there must be a reversal in that case, "because the jury did not pass upon the plea of former acquittal and only rendered a verdict on the plea of not guilty." In this particular, also, the present case is parallel with the one cited. The jury rendered a verdict of guilty, but made no response to the issue upon the other plea.

The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded.

[Payne v. The State.]

## Payne v. The State.

### *Indictment for Murder.*

1. *Change of venue, on account of incompetency of presiding judge of circuit.*—When application for a change of venue in a criminal case, on account of the incompetency of the judge of the circuit to preside, is made in vacation, under the provisions of the act approved January 26, 1875, and is refused by him, on the ground that he has made arrangements with the judge of the adjoining circuit to preside in his place at the next term; this furnishes no reason why the presiding judge at the next term, not being disqualified to sit in the cause, should continue it, or decline to try it.

2. *Same.*—The act approved January 26, 1875, entitled “An act to provide for a change of venue in certain cases” (Sess. Acts 1874-5, p. 231), is superseded and repealed by the constitutional provision on the same subject, contained in the 18th section of the 6th article of the constitution of 1875.

3. *Threats by deceased against prisoner; when not admissible.*—In a case of homicide, where no question of self-defense arises—as where the prisoner, having had a quarrel with the deceased, rode off several miles, and procured a gun, and followed the deceased from place to place, and attacked him when they met, and shot and killed him, the deceased having no weapon in his possession—threats made by the deceased against him two weeks previously, and communicated to him, are not competent evidence for the prisoner.

4. *Impeaching witness, by proof of contradictory statements.*—A witness may be impeached in a criminal case, by proof of contradictory statements made by him on an application by the prisoner for bail; although, when cross-examined as to such statements, he says “he does not remember whether he said so or not.”

FROM the Circuit Court of Colbert, on change of venue from Lauderdale.

Tried before the Hon. WM. S. MUDD.

The prisoner in this case, George W. Payne, was indicted for the murder of John Edward Smith. The indictment was found in the Circuit Court of Lauderdale, at its April term, 1874; and the trial was removed, on the application of the prisoner, at the same term, to Colbert county. After several continuances, the prisoner presented his written petition, under oath, to Hon. W. B. Wood, the presiding judge of the 4th judicial circuit, which embraces the counties of Lauderdale and Colbert, asking that the case might be sent to another circuit for trial, under the provisions of the act approved January 26, 1875, entitled “An act to provide for a change of venue in certain cases” (Session Acts 1874-5, pp. 231-32), on the ground that Judge Wood was incompetent and disqualified to preside on the trial, being the uncle by blood of the deceased. This petition was presented to Judge Wood in vacation, and was refused by him, his indorse-

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ment on it being in these words : "The prayer of the petition is refused, because I have arranged with Judge Mudd to hold court for me in Lauderdale and Colbert counties." At the ensuing term, when the case was called for trial before Judge Mudd, "the defendant moved the court for a continuance of the trial, and insists that this court should not try this cause, and moves the court to decline doing so;" and proved to the court, in support of these motions, his said application to Judge Wood. The court overruled the motions, and required the trial to proceed ; to which rulings the defendant excepted.

"On the trial," as the bill of exceptions states, "it was proved that the defendant killed John Edward Smith, by shooting him with a double-barreled shot-gun, on the 29th December, 1873, in Lauderdale county, Alabama. The proof showed that, early in the morning of that day, the defendant went to the house of Bud Arnold, where the deceased boarded, which was about two miles from where the defendant lived ; and a witness stated, that the deceased afterwards told him 'that he ran the defendant out of Arnold's house, and said that defendant should not sit by a fire he had made.' The proof then showed that, after the difficulty at Arnold's, the defendant went to the house of one Mangum, some two miles from Arnold's, and across the line into Tennessee, and asked Mangum to go deer-hunting with him, which Mangum refused to do ; that the defendant then borrowed a double-barreled shot-gun from Mangum, and rode back to Arnold's ; that he met one Carson in front of Arnold's, and asked him where the deceased was ; that Carson told him he had gone off up the road, with one Hitchcock, to Ham Rhodes's gin-house ; that the defendant then called to Mrs. Arnold, and asked where the deceased was ; that she informed him the deceased had gone down to the bottom to hunt for cattle, and told him she did not want him to have any difficulty with the deceased ; and that he replied, 'That was not his way.' She told him, also, that she was fixing the clothes of the deceased, and he was going off home the next day. Defendant said to her, that the deceased 'would leave sooner than to-morrow ;' and that he 'would always think hard of Bud Arnold for keeping such a man as Smith about his house.' The defendant, the proof further showed, then rode up the road, in the direction of Rhodes's gin-house, and stopped at the house of Mrs. Brown.

"Mrs. Brown testified, on the part of the State, that on the morning of the 29th December, 1873, the defendant came to her house, which was about two miles from Bud Arnold's, and hitched his horse in the yard, and came into the house ;



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that he had a double-barreled shot-gun; that he took a seat by the fire, after passing the usual salutations, and she jestingly asked him why he was carrying a gun; to which he replied, 'it was christmas times.' Witness had learned that defendant was going to move, and asked him when he was going to move; to which he replied, that 'he expected to move next week, if the load in his gun did not force him to leave sooner.' Defendant asked her, if Hitchcock had gone up the road that morning; and she replied, 'yes.' Defendant then asked, if Smith was with him; and she replied that he was. Defendant then said, 'I hear them coming down the road now;' and went out of the room, and hailed Hitchcock, who came riding down the road in front of the house, in company with the deceased. When Hitchcock was hailed, he and the deceased both checked up, or stopped their horses in front of the gate, and both sat on their horses. Defendant and Hitchcock passed the usual salutations, and defendant then said to the deceased, 'Do you want anything out of me this morning?' and about the same time raised his gun towards the deceased. The deceased said, 'Don't shoot,' and got down from his horse, about ten or twelve feet from the gate. Witness then turned away into the house. She heard the gun fire, and found afterwards the deceased was shot in the breast: he was killed, and fell across the gate-way, just outside of the gate. Defendant then got on his horse, and rode off, at first slowly, but after a little while he quickened his pace.

"Hitchcock was examined as a witness by the State, and stated that, on the morning of the killing, he rode to Arnold's house, and found the deceased trembling and excited, and asked him if he was cold. Deceased said, that he was mad, and that he had run the defendant out of the house that morning. Witness said, 'Eddie, perhaps you ought not to have done so.' Deceased said, 'Dr. Payne should not sit by a fire he had made.' Witness and deceased then rode to the gin of Ham Rhodes, and on their return came to the house of Mrs. Brown, which was on the road between the gin-house and Arnold's. As they came riding down the road that passed in front of the house, the defendant stepped out on the piazza, and said, 'Good morning, Jeff, dont you want to go driving to-day?' Witness replied, 'No, I have to go down in the bottom, and haul some cord wood.' About that time, the defendant got pretty near, and to the fence, which was about eight or ten paces from the door of the house. Defendant said to the deceased, '*Do you want anything out of me this morning?*' and raised his gun. Deceased said, '*Come out into the road*'; and he said something else that witness

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did not understand. Witness then said, 'Let us have no fuss here this morning, boys.' Defendant had his gun raised, when witness said, 'Don't shoot.' By that time, the deceased had got off his horse, and the gun fired. Deceased said, 'Don't shoot any more,' and stepped forward about ten steps, and eased down on his knees, and fell dead across the gate-way, just outside the fence. Witness stated, that when deceased got off his horse, he *sorter* moved his horse rather between him and defendant; that defendant stepped around, and fired; and deceased stepped ten steps, and fell. Witness stated, also, that he saw no arms about the deceased; that he went off, after the deceased was killed, and got persons to assist in taking care of the body of the deceased; and that they found a small pocket-knife in his pocket. The deceased was eighteen or nineteen years old. It was shown that, after he was shot, he fell across the gate-way; that the defendant led his horse out at the gate, and over the legs of the deceased, and rode off slowly, but further on was seen going in a lope; and he was afterwards arrested by an officer, about daylight one morning, at Ripley, Mississippi. It was shown, also, that from the time defendant was first at the house of Arnold in the morning, to the time when deceased was killed, was about two hours.

"The defendant then offered to prove, by Andrew Lamb and Andrew Carson, that they were at the defendant's gate, about two weeks before the killing, when the deceased came out of the defendant's yard, and told them he had gone into the defendant's house with the intention of beating his brains out; that the deceased was armed with a pistol and a club, and said he had run defendant out of his house; which fact occurred, and which threats were communicated to defendant, about two weeks before the killing. To the admission of this evidence the State objected, and the court sustained the objection; to which the defendant excepted. During the farther progress of the trial, the defendant's counsel asked said Hitchcock, a witness for the State, if he did not testify on the defendant's application for bail, that the deceased got off his horse and said, 'Come out into the road,' before the defendant raised his gun; to which he replied, that he did not remember whether he said so or not. Defendant then introduced one Hendrix, and proposed to prove by him that said Hitchcock did state, on the trial for bail, that deceased got off his horse and said, 'Come out into the road,' before the defendant raised his gun; to which evidence, as proposed, the State objected, and the court sustained the objection; to which ruling and action the defendant duly excepted.

"Upon the foregoing evidence, the court gave the follow-



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ing charge in writing, with other charges: 'If the jury believe, from the evidence, that the defendant and the deceased had a difficulty in the morning, at the house of Bud Arnold, in which the deceased forced the defendant to leave the house; and that the defendant, after said difficulty, went off to the house of Mangum, and borrowed a double-barreled shot-gun, with the intention to shoot and kill the deceased; and that, in pursuance of such intention, he went to the house of Mrs. Brown, some hours after procuring the gun, and then and there, in the manner, and under the circumstances testified to by Mrs. Brown and Hitchcock, shot and killed the deceased—then the killing was murder; and if the killing was willful, malicious, deliberate, and premeditated, it was murder in the first degree; but, if it was not willful, malicious, deliberate, and premeditated, it was murder in the second degree. And in determining what the intention of the defendant was in procuring the gun, and whether he killed the deceased in pursuance of said intention, the jury may look to the fact that there was a difficulty between the deceased and the defendant that morning, if such be the fact, and also to the acts and words of the defendant at the time he borrowed the gun, and to what was said and done by him after procuring the gun, and prior to the time of the killing, and to all the circumstances connected therewith, and also what the defendant did after the killing, as the said acts and words may have been proved by the testimony of the witnesses.'

The defendant excepted to this charge, and then requested the court to give the following charge, which was in writing: "If the jury believe, from the evidence, that on the morning of the homicide, and two hours before the homicide, there had been a difficulty between the deceased and the defendant; and that the deceased stopped at Mrs. Brown's house, and without having explained his visit, said to the defendant, in answer to the question, '*Do you want anything out of me this morning?*' '*Come out into the road;*' and that the parties were at that time distant from each other about twelve feet, or the length of a fence rail; and that contemporaneously the deceased dismounted from his horse, and the defendant raised his gun; and that after the deceased got off his horse, and that (?) if he was moving around the neck of the horse, and was found, after the shot which resulted in his death, lying across the gate-way of the passage leading into the yard of Mrs. Brown, at whose house it was admitted he was killed, distant (?) from the place where, just before the killing, he was last seen, taken in consideration with all the circumstances of the case,—are facts to which the jury may look, in



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determining whether the defendant, in killing the deceased, acted under the reasonable impression that his life was threatened, or that his person was in danger of great bodily harm; and that if such was the danger, or under the circumstances the defendant had reasonable cause to believe so, whether the danger was actual or not, the defendant had the right to defend himself by shooting, even though it resulted in the death of the deceased, and that the defendant is not guilty of any offense." The court refused this charge, and the defendant excepted to its refusal.

O'NEAL & O'NEAL, for the prisoner.—1. The judge of the fourth circuit was incompetent, on account of his relationship to the deceased, to preside on the trial of the case, or to make any order in reference to it, except to order its transfer to another circuit, on the filing of the petition asking such transfer. The terms of the statute are imperative, and gave him no discretion in the matter; and he can not be permitted to evade the statute, by selecting another judge to preside for him.—*Ex parte Banks*, 28 Ala. 28; *Etheridge v. Hall*, 7 Porter, 47; *Ex parte McCrary*, 22 Ala. 65; *Vaughn v. Robinson*, 22 Ala. 519; *McCauley v. The State*, 26 Ala. 135; *Pulliam v. Owens*, 25 Ala. 492; 6 Cranch, 312; 16 Peters, 97; 10 Grattan, 658; *Ex parte Echols*, 39 Ala. 698; *Bartlett & Waring v. Morris*, 9 Porter, 266.

2. The threats of the deceased, as offered in evidence, were competent evidence, and ought to have been admitted. *Holler v. The State*, 37 Indiana, 57, or 10 Amer. R. 74; *Cornelius v. Commonwealth*, 15 B. Monroe, 539; *Campbell v. People*, 16 Illinois, 18; *Keener v. The State*, 18 Geo. 194; *Wiggins v. People*, 3 Otto, 465; *People v. Lamb*, 2 Keyes, 466; *Powell v. The State*, 19 Ala. 577; *Dupree v. The State*, 33 Ala. 380; *Stokes v. People*, 53 N. Y. 174; *People v. Scoggins*, 37 Cal. 676; *Monroe v. The State*, 5 Geo. 85; *State v. Sloan*, 47 Mo. 604; 2 Halst. 220; 19 Vermont, 116; 42 How. Pr. 31.

J. B. MOORE, with the Attorney-General, for the State.—1. No question of self-defense arose in the case, and the former threats of the deceased were not admissible for any purpose. *Pritchett v. The State*, 22 Ala. 39; *Murphy v. State*, 37 Ala. 146; *Hughey v. State*, 47 Ala. 103; *Eiland v. State*, 52 Ala. 334; *Harrison v. The State*, 24 Ala. 67; 23 Ala. 28; 47 Miss. 581, 318; 9 Nevada, 58, 106, 120; 31 Penn. 198; 44 Penn. 55; 3 Selden, 385; 11 Geo. 615; 4 Iredell, 409; 2 Mason, 91.

2. The action of Judge Wood, on the petition for the transfer of the case to another circuit, is not revisable in this proceeding. There was no objection to the competency of

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Judge Mudd; and if the transfer had been made, the case would have been tried before him.

MANNING, J.—The refusal of the judge of the 4th judicial circuit to transfer this cause to a court in another circuit, when petition for that purpose was filed in vacation, under the “act to provide for a change of venue in certain cases,” approved January 26, 1875, constituted no reason why the judge presiding at the trial, who was in no way disqualified, by relationship or otherwise, to sit therein, should grant the motion of defendant to continue the cause, or that to decline trying the same. The object of the enactment was to expedite trials before disinterested judges and chancellors; and this object was as well attained by the trial in Colbert county, when the presiding judge there was free from the objection alleged against the judge of that circuit, as it could have been by a change of venue to a court in another circuit. The proper mode of testing the question, whether the reason was sufficient, which was assigned by the judge of the circuit for not granting the prayer of the petition, would have been by having that particular matter presented in a proper manner to this court for its judgment thereupon. The motions made tended only to an indefinite and aimless delay.

2. In respect to the statute referred to, it was passed after the commission of the offense charged against appellant, and after the finding of the indictment. It was, therefore, subject to repeal or alteration by subsequent legislation, which in such case could not be held obnoxious to the constitutional prohibition against *ex-post-facto* laws. We think the statute was, in fact, superseded by the provisions on the same subject in section 18, article 6, of the constitution of 1875–6, and at the time of the trial was not in force.

3. In *Pritchett v. The State* (22 Ala. 39), the person slain had made threats of personal violence against the prisoner, which had been communicated to him; and on the morning preceding the day on which he was killed, the deceased had gone to the field in which the prisoner had been plowing, and with a pistol in one hand, and a rock or stick in the other, had forbid the prisoner's going to his plow. Just before the killing, the prisoner was seen starting from his house, priming his gun, picking the flint, and crying; and proceeding to the premises of the deceased, and finding him at home, he said to him in a loud voice, “Stop, I have come to shoot you.” Thereupon, the deceased stopped, turned round, and was shot by the prisoner and killed. On the trial, it was proved that the prisoner was, previously, a peaceable and orderly citizen, and he proposed to prove that the person he



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slew was a turbulent and quarrelsome man ; which the court, upon objection of the State's solicitor, would not permit him to do. In a very carefully considered opinion, sustaining the ruling of the court below, CHILTON, C. J., speaking for the court, says: "The law, having respect to the nature of man, and aiming to arrive at the true intent and motive which characterize acts prohibited by it, allows every fact and circumstance *immediately connected with the act*, and which tends to elucidate and explain its nature, or the motive and intent which moved to its perpetration, to be given in evidence. It endeavors to adjust the measure of defense to the nature of the assault ; and in doing this, it permits the *party assailed to view the assailant*, just as he is : for it is chiefly from a knowledge of the true condition of the parties, at the time the act is done, that we can arrive at the motives which may reasonably be supposed to have influenced them.

In such a case, the act and *status* of the actor must be taken together. Thus it is, the character of the deceased may become a legitimate subject of inquiry, as connecting itself with the transaction which it may serve to explain. But, however bad or desperate that character may be, and however many threats such person may have made, he forfeits no right to his life, until, by an actual attempt to execute his threats, or by some act or demonstration at the time of killing, taken in connection with such character or threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person. And when a homicide takes place under such circumstances as tend to show that the slayer acted in self-defense, the previous threats of the deceased, his conduct upon the fatal occasion, construed with reference to his known character, and peculiarities having relation to such conduct, and tending to explain it,—all enter into, and form parts of the transaction, and may be properly received as evidence." But, because that case was not one of self-defense, and the slayer sought his enemy and killed him, it was decided that the evidence of the character of the deceased was properly excluded.

We have quoted so largely from this thoughtful and judicious opinion, because, upon "a principle of law of much delicacy and importance," it seems to us to avoid, much better than any other we can now refer to, the two extremes—that of not tenderly enough considering the situation in which the accused was placed, on the one hand,—and on the other, that of conceding too much indulgence to undisciplined passions ; which neither law nor religion can permit to be gratified by the sacrifice of a thing so sacred as human life.



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In the present case, as in Pritchett's, appellant sought his victim, following him from one place to another, until they met, and then accosted him with the challenging inquiry: "Do you want anything out of me this morning?" Soon after which, he fatally shot the deceased, at a time when the latter had no weapon drawn, nor any in fact on his person. It was, in no legal sense, a case of self-defense; and the able judge who presided at the trial correctly ruled, that testimony of threats, alleged to have been made by the deceased two weeks before, could not be submitted to the jury as evidence in favor of the defendant.—See, also, *Hughey v. The State*, 47 Ala. 97.

There was no error in the charge given to the jury, which was excepted to, or in refusing the charge that was asked on behalf of defendant, and refused. The latter was objectionable, in reciting a fact that was not proved; and also because, without explanation, it would be apt to confuse, instead of aiding the jury.

4. But there was error in excluding the testimony offered to show that Hitchcock, a witness for the State, had given a different account of the circumstances of the killing of Smith by the defendant, when examined upon the application for bail, from that which he gave on the trial. Hitchcock's attention had been called, on cross-examination, to the difference between these two statements. He was asked if, on the former occasion, he did not testify "that defendant got off his mule, and said, 'Come out in the road,' before defendant raised his gun;" to which he replied, that "he did not remember whether he said so or not." On the trial, this witness testified, that defendant "said to the deceased, 'Do you want anything out of me this morning?' and raised his gun;" and he represents deceased as having *afterwards gotten off his horse*.

The rulings, in such cases, have not been uniform. Phillips, in his work on Evidence, says, that *Tindal*, C. J., in a case before him, "said he had never heard such evidence admitted in contradiction, except where the witness had *expressly denied the statement*, and he rejected the evidence; and on another occasion, Lord Abinger, C. B., expressed a similar opinion. But Parke, B., in a case before him, held that contradictory statements of a witness could be introduced to impeach his evidence; though, in order to lay a foundation for them, and to enable the witness to explain them (and, as he conceived, for that purpose only), 'the witness must be asked whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence he had said it, or some other circumstance sufficient

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to designate the particular occasion. If the witness admits the conversation imputed to him, there is no necessity to give further evidence of it; but, if he says he does not recollect, that is not admission; and you may give in evidence, on the other side, to prove that the witness did say what was imputed, always supposing the statement to be relevant to the matter at issue."—2 Phillipps on Ev. (4th Am. ed., with Cowen & Hill's and Edwards' notes), 959-60. We agree with Mr. Phillipps, that the ruling of Baron Parke is the most sound and fittest to be followed. If the rule were otherwise, it might happen that, under the pretense of *not remembering*, a witness, who has made a false statement, and knows it to be false, would escape contradiction and exposure.

This particular question seems to have rarely come up in the American courts, whose decisions are reported. We find, however, that in Vermont the rule corresponds with that adopted by Baron Parke.—*Holbrook v. Holbrook*, 30 Vt. 433. In Massachusetts and Maine, contradictory statements of a witness are allowed, without any previous interrogation of him about them. In Alabama, he is first examined concerning them—only, however, to *prevent surprise, and afford him an opportunity for explanation*.—2 Brick. Dig. 548, §§ 117, 118. But, if the witness says he has no recollection of having made such contradictory statements, they may be proved.

For the error of not permitting this to be done, the judgment must be reversed, and the cause remanded. Let the prisoner remain in custody, until discharged by due course of law.

## Connelly v. The State.

### *Indictment for Renting House for Gaming Purposes.*

1. *Trial by jury; constitutionality of law authorizing waiver of.*—The constitution of Alabama, while declaring that "the right of trial by jury shall remain inviolate," and that the defendant, "in all prosecutions by indictment," shall be entitled to a "speedy public trial by an impartial jury," also declares that the legislature may provide for the prosecution of misdemeanors before justices of the peace, thereby dispensing with a trial by jury; hence, a statute which authorizes a waiver of a trial by jury in such cases, the prosecution being commenced by indictment, and transferred to an inferior court, is not unconstitutional.

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FROM the County Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

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The indictment in this case was found by a grand jury of the Circuit Court, and the case was transferred to the County Court, under the provisions of the act approved February 9, 1877, entitled "An act to regulate the trial of misdemeanors in Madison county."—Session Acts 1876-7, p. 149. On the case being called, as the minute-entry recites, "the defendant is asked by the court if he will have a jury, and waives a jury in open court; and thereupon, after hearing the evidence," all of which is set out in the bill of exceptions, "and the argument of counsel, the court adjudges the defendant guilty as charged, and fixes his fine at \$200; to which the said defendant, in open court, excepts." There was a motion in arrest of judgment, on the ground that the court had no jurisdiction of the case, because the said act authorizing the transfer was unconstitutional; but the record does not show what disposition, if any, was made of it.

WALKER & SHELBY, for the prisoner.—The right of trial by jury, in all prosecutions by indictment, being secured by constitutional provisions (Art. I, §§ 7, 12), and this being a prosecution by indictment, the defendant's consent to a trial without a jury is a nullity, and his conviction is illegal.—*Cancerni v. The People*, 18 N. Y. 129; *Lord Dacre's case*, Keyl. R. 59; *Work v. The State*, 2 Ohio, 1 Warden, 296; *Hill v. People*, 16 Mich. 351; *People v. Smith*, 9 Mich. 193; *Cooley's Const. Limitations*, 399.

JOHN W. A. SANFORD, Attorney-General, for the State.—The right of a trial by jury was not denied the defendant, but was expressly waived by him, as the record shows. The special law under which the case was transferred to the County Court, and which was strictly complied with, carefully guards the right of trial by jury. The constitution, by the 9th section of the 1st article, authorizes the general assembly to provide for the prosecution of misdemeanors before justices of the peace, or before inferior courts; and this necessarily dispenses with a trial by jury in such cases. That the County Court is an "inferior court," within the meaning of this provision, see *Sanders v. The State*, at the last term.

STONE, J.—The act "to regulate the trial of misdemeanors in Madison county," approved February 9th, 1877—Pamph. Acts, 149—confers on the County Court of that county jurisdiction, concurrent with the Circuit Court of said county, "for the trial of all misdemeanors, except violations of the revenue laws of this State." The statute then provides



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for the transfer to the County Court, on the day of adjournment of each succeeding term of the Circuit Court, of all such causes as were pending in said Circuit Court, and undetermined at the time of such adjournment; and thereupon, "the jurisdiction of the Circuit Court shall cease, and exclusive jurisdiction shall vest in the County Court.

Section 4 of the act declares, "that it shall be the duty of the judge of the County Court, to hear counsel, and decide these causes without a jury, unless the defendant demands a jury; but the question must be put to the defendant, whether he will have a jury; and if he waive a jury, it must be entered of record; but, if a jury is demanded, and in no other case, the court shall order the sheriff of said county to summon, *instantly*, twenty-four free- or house-holders of the county, from whom a jury shall be impaneled; the procedure of the trial, except as altered by this act, to be the same as now provided by law for like cases in the Circuit Court."

In the present case, the order of transfer was made to the County Court, as above provided; and before entering on the trial, as the record informs us, the defendant was asked by the court if he would have a jury, and he waived it; which was entered of record. It is contended before us, that the provision of the statute copied above is violative of the following provisions of the constitution of 1875, and therefore void: "That in all criminal prosecutions, the accused has a right," &c; "and in all prosecutions by indictment, a speedy public trial by an impartial jury," and "that the right of trial by jury shall remain inviolate."—Declaration of Rights, §§ 7, 12.

In answer to this objection, it might be sufficient to say, that the statute in question secures to every one tried thereunder for a misdemeanor, the right of trial by jury; and he can be tried by the court, only when he "waives a jury." But we place our decision on a broader ground. Section 9 of the declaration of rights provides, "that in cases of petit larceny, assault, assault and battery, affray, unlawful assemblies, vagrancy, and other misdemeanors, the general assembly may, by law, dispense with a grand jury, and authorize such prosecutions and proceedings before justices of the peace, or such other inferior courts as may be by law established." True, this clause of the constitution only provides, in terms, for this dispensing with a grand jury; but, in conferring on the general assembly power to "authorize such prosecutions and proceedings before justices of the peace," the framers of the constitution must be understood as intending that such trials should be had, as trials before justices usually take place. We well know that such

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trials are without juries, unless some special statute makes their presence necessary.

In Kentucky, the constitution, like ours, guaranteed the right of trial by jury; and it contained no clause like ours, copied above from the 9th section of the declaration of rights. Murphy was indicted for a misdemeanor; and the question was, whether he could lawfully consent to be tried by a jury composed of less than twelve persons. The court said: "The citizen has an undoubted right to make any disposition of his money or his property which is not prohibited by law. He may, when his right to any part of it is controverted, consent to have the controversy decided by the court, without the intervention of a jury; or by a majority of the jury, or by any number of persons acting in the capacity of jurors, and such an agreement would be obligatory upon him."—*Murphy v. Commonwealth*, 1 Metc. 365.

In *State v. Mansfield*, 41 Mo. 470, the same doctrine was asserted.

In *The State v. Cox*, 3 Eng. Ark. 436, the offense charged was an assault and battery; and the question was, whether under their constitution, which guaranteed right of trial by jury, a verdict of a jury composed of less than twelve jurors, under a statute of that State, would stand. The court said: "The constitutional provision, securing the right of trial by jury, means a jury of twelve men, according to the known technical meaning of the term. Of his right to such a jury the defendant cannot be deprived, except by his own consent. True, he may waive the right, and submit to a decision of six men, even to that of a justice of the peace himself; but, in all cases where he may require it, it is the duty of the justice to impanel a jury of twelve men for the trial of the cause." Of similar import is the case of *Brown v. The State*, 16 Ind. 496.

The legislature of New Hampshire had before them a proposition to reduce the number of jurors to six, for the trial of misdemeanors, and submitted the question of their constitutional power to do so to the six judges of their Supreme Court. They held, that the constitutional right to a trial by jury meant a jury of twelve men; but all the judges concurred in the following opinion: "The legislature have the general power to constitute new tribunals, and to provide new modes of trials for future cases; provided the right to a trial by jury, such as the constitution intends, is secured to every one in the last resort, in every case where it is guaranteed by the constitution, and has not been waived by the party himself."—See 41 N. H. 550.

In the case of *Commonwealth v. Dailey*, 12 Cush. 80, Ch J.  
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Shaw, delivering the opinion of the court, carried the doctrine of waiver of constitutional right to trial by jury, in cases of misdemeanor, much further than was done in any case quoted above.

There are some authorities in conflict with these views; but in none of them had they a constitutional provision, such as is quoted from the 9th section of our declaration of rights. See *Cancerni v. People*, 18 N. Y. 128; *Work v. The State*, 2 Ohio State, 295; *Hill v. People*, 16 Mich. 351; Cooley's Cons. Lim. 309, 319.

Under the constitution of 1875, we hold, that the act "to regulate the trial of misdemeanors in Madison county," in its provision allowing parties indicted for misdemeanor, and tried in the County Court, to waive a jury, is constitutional.

There is nothing in any other question presented, and the judgment of the County Court is affirmed.

## Goodloe v. The State.

### *Indictment for Arson.*

1. *Caption of indictment.*—The caption of an indictment is that entry of record showing when and where the court was held, who presided as judge, the venire, and who were summoned and sworn as grand jurors; which caption is an essential part of every indictment, and must be affirmatively shown by the record, though the doctrine possibly had its origin in *certiorari* proceedings from courts of inferior and limited jurisdiction.

2. *Change of venue; what record must show.*—To sustain a judgment of conviction in a criminal case, in a county other than that in which the indictment was found, the record must show a valid order transferring it, made by the court in which the indictment was found: a written agreement, signed by several attorneys, and copied into the transcript, consenting to the transfer of causes "which by law have to be, and which may be transferred," and waiving "the formal certificate of transfer of said cases," is not sufficient, when the record does not show that the defendant's case was embraced in the agreement, and he had not been arrested when the agreement was made.

FROM the Circuit Court of Colbert.

Tried before the Hon. W. B. Wood.

The record in this case is very defective, and the return to a *certiorari*, which was granted on motion of the Attorney-General, does not remedy the defects. It shows that, at the Fall term, 1868, of the Circuit Court of Franklin, an indictment for arson was found against *Jack Mhoon* and twelve other persons; that at the Fall term, 1873, the said defendant not having been arrested, the indictment was, by order of the Circuit Court of Colbert, withdrawn and filed; that



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the defendant was arrested on the 15th March, 1875, under a *capias* issued by the clerk of said last named court; that he gave bail in open court, at the next ensuing term, by the name of Jack Mhoon, *alias* J. M. Goodloe; and that, after several continuances, he was tried at the Fall term, 1877, was convicted, and sentenced to the penitentiary for the term of five years. The record contains, also, an agreement dated "Franklin Circuit Court, March term, 1870," and signed by twelve attorneys, in these words: "Whereas, there are many cases on the docket of the above court, which by law have to be, and which may be transferred to Colbert Circuit Court, on the law docket, and some on the Chancery Court docket, which have been adjudged to be transferred to Colbert county by the present Circuit Court of Franklin: now, we, the attorneys of the respective cases, do here now agree, in open court, to each of said transfers, and docketing and bringing said cases in Colbert Circuit Court; and we waive the formal certificate of transfer of said cases, and waive absolutely the necessity of sealed certificates of the clerk: his note of transfer, or memorandum at the foot of catalogue, schedule, or docket of such cases, shall be sufficient,—this, formal or informal." There is no "catalogue, schedule, or docket of such cases," contained in the record, nor anything else showing what cases were embraced in the agreement. It is now assigned as error, that the court had no jurisdiction of the case, and that the record does not show the organization of any grand jury.

WALKER & SHELBY, for the prisoner, cited *Tipton v. The State*, Peck, Tenn. 310; *Cornwall v. The State*, Martin & Yenger, 148; *Fitzgerald v. The State*, 4 Wisc. 395; *State v. Williams*, 2 McCord, 301; *State v. Zule*, 10 N. J. L. (5 Halst.) 348; 1 Archb. Cr. Pr. & Pl. 235, note 1, 8th edition; *Reeves v. The State*, 20 Ala. 33; *Noles v. The State*, 24 Ala. 672.

JOHN W. A. SANFORD, Attorney-General, for the State.—Pleading to an indictment, without objection, is an admission of its genuineness.—*Clarkson v. The State*, 3 Ala. 378; *Russell v. The State*, 33 Ala. 66; *Shaw v. The State*, 18 Ala. 547; *Floyd v. The State*, 30 Ala. 511. The case was evidently transferred to Colbert county under the act approved February 8, 1870 (Session Acts 1869-70, p. 145); and no order of court, or consent of parties, was necessary. There is no bill of exceptions, and nothing to show where the crime was committed; and the presumption will be indulged, in the absence of any objection by the prisoner, that it was com-

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mitted in that part of Franklin which is now embraced in Colbert county.

STONE, J.—In *Reeves v. The State*, 20 Ala. 33, Ch. J. DARGAN said: "The caption of an indictment is that entry of record showing when and where the court is held, who presided as judge, the *venire*, and who were summoned and sworn as grand jurors; and this caption is applicable to, or is a part of every indictment, and need not be again repeated in any part of the indictment." This doctrine had been substantially affirmed in several decisions.—See *State v. Lapsley*, 7 Por. 526; *State v. Murphy*, 9 Por. 487; *Morgan v. The State*, 19 Ala. 556; *Noles v. The State*, 24 Ala. 672; *Rose v. The State*, Minor, 28. As shedding some light on the subject we are considering, see *State v. Clarkson*, 3 Ala. 378; *Shaw v. The State*, 18 Ala. 547; *Russell v. The State*, 33 Ala. 366; *Harrington v. The State*, 36 Ala. 236.

Following the lead of the cases cited above, we feel it our duty to regard the question as settled in this State, that a caption, such as is described in *Reeves v. The State*, *supra*, is an essential of a good indictment; and when the question comes before us on appeal, if the record does not contain such caption, it is a fatal error. If it were an open question in this State, it might admit of serious doubt if this doctrine did not have its origin in *certiorari* proceedings from courts of limited, inferior jurisdiction; and that it should not be applied to records from courts of general jurisdiction.—See the doctrine fully discussed, and the rulings of the various courts collated, in 1 Bish. Cr. Proc. §§ 653 to 666, and note 2 to § 665. *Stare decisis*. There is no caption in the present record, and the result is, that the judgment must be reversed on that ground.

2. The present record discloses no reason why the cause was transferred from Franklin to Colbert county. The indictment purports to have been found in Franklin county, at the Fall term, 1868. The prisoner was tried and convicted in Colbert county, at the Fall term, 1877. He does not appear to have been arrested, or ever to have been in custody, until 1875. The record contains what purports to be an unofficial agreement, signed by certain persons styling themselves attorneys, consenting to the transfer from Franklin to Colbert county, of the causes in the courts of the former county, "which by law have to be, and which may be transferred to Colbert county Circuit Court," and waiving "the formal certificate of transfer of said cases, . . . the necessity of sealed certificates of the clerk: his note of transfer, or memorandum at the foot of catalogue, schedule, or docket

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of such cases, shall be sufficient,—this, formal or informal.” This agreement bears date March 22d, 1870, and omits all mention of the cases transferred. The record contains no evidence that the agreement was of record, or otherwise authenticated. The record contains also an unofficial certificate of the clerk of Franklin Circuit Court, that this is one “of the State cases that were transferred by agreement to the Circuit Court of Colbert county.” The foregoing is all the evidence or authority, furnished by the record, for the transfer to Colbert county. It is wholly insufficient. Waiving all consideration of the question, of which the agreement furnishes no solution, whether either of the attorneys signing the agreement was counsel for the prisoner, Goodloe—whether, in fact, he had any counsel, for he had not then been arrested; so grave a question as the right and jurisdiction of the Circuit Court of Colbert county to try a prisoner, under an indictment for a felony, found by a grand jury of Franklin county, must be shown by higher evidence than unofficial agreements of counsel, and an unofficial certificate of the clerk of the court. Indictments can only be rightly preferred, and, when found, are presumed to be found, in the county in which the offense was committed; and prisoners can only be tried in the county in which the indictment is found, unless, for some legal reason, to be shown by the record, the venue and trial are removed to another county. Code of 1876, §§ 4632, 4911; *Paris v. The State*, 36 Ala. 232. The record in the present case fails to show a legal transfer to Colbert county, and, therefore, fails to show any jurisdiction in the court to try the offender.—See Pamph. Acts 1869-70, p. 145-6.

There is not enough in this record to inform us whether or not the present prosecution has been discontinued.—*Ex parte Rivers*, 40 Ala. 712.

Reversed and remanded. Let the prisoner remain in custody, until discharged by due course of law.

There is in this record no order suspending the execution of the sentence until the hearing of this appeal; and it has been suggested that the prisoner is confined in the penitentiary. It is therefore ordered, that the sheriff of Colbert county demand and receive said prisoner from the warden of the penitentiary, and hold him in custody, to abide the further order to be made by the Circuit Court in this cause. And the clerk of this court is ordered to forward to the sheriff aforesaid a copy of the judgment of reversal in this cause, and of this order, duly certified; upon the production and surrender of which to the warden of the penitentiary,



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said warden will deliver said prisoner to said sheriff, taking his receipt therefor.—Code of 1876, § 4992.

## Toney v. The State.

### *Indictment for Keeping Bawdy-House, and for Vagrancy.*

1. *Keeping bawdy-house, and vagrancy; sufficiency of indictment.*—A count which charges that the defendant “did keep a certain house of ill fame, then and there resorted to for the purpose of public prostitution and lewdness,” sufficiently charges the common-law offense of keeping a bawdy-house; and a count which charges that she “was a common prostitute, or the keeper of a house of prostitution, and had no honest employment, whereby to maintain herself,” sufficiently charges the statutory offense of vagrancy (Code of 1876, § 4218); but a count which simply charges that she “was a common prostitute, or the keeper of a house of prostitution,” without more, is not a sufficient charge of any offense.

2. *Verdict of guilty, under indictment containing good and bad counts.*—When an indictment contains several counts, one of which is good, and there is no demurrer to the bad counts, a general verdict of guilty will be referred to the good count, and the conviction will be sustained.

3. *Keeping bawdy-house; what constitutes offense, and evidence of.*—Under an indictment for keeping a bawdy-house, evidence of the general reputation of the inmates of the house, but not of the house itself, is admissible for the prosecution; and it must be shown that the defendant governed or managed the house, or assisted in its government and management: it is not enough to show that she resided in the house for the purposes of prostitution.

4. *Vagrancy as common prostitute, or keeper of house of prostitution.*—Under an indictment for vagrancy as a common prostitute, or keeper of a house of prostitution, having no honest employment whereby to maintain herself, evidence of the reputation of the house in which the defendant lived is not admissible for the prosecution; nor is the bad character of the defendant admissible, in the first instance, as a fact showing that she was a common prostitute; but it may be shown that she resided in a house kept for prostitution, and was there visited by lewd and disorderly persons, and that her associates were persons of ill repute; and these facts being proved, she may, in rebuttal, prove that her health and physical condition rendered prostitution improbable, if not impossible.

FROM the County Court of Madison.  
Tried before the Hon. WILLIAM RICHARDSON.

HUMES & GORDON, for the defendant.

JOHN W. A. SANFORD, Attorney-General, for the State.

BRICKELL, C. J.—The indictment contains three counts; the first charging, that the defendant “did keep a certain house of ill fame, then and there resorted to for the purpose of public prostitution and lewdness;” the second charging,

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that she "was a common prostitute, or the keeper of a house of prostitution, and had no honest employment, whereby to maintain herself;" the third charging, that she was "a common prostitute, or the keeper of a house of prostitution." The first count charges the common-law misdemeanor of keeping a bawdy-house. The second is a count for vagrancy, under the statute.—R. C. § 3630; Code 1876, § 4218. The third is not a sufficient charge of any offense, either at common law, or under the statute. There was, however, no demurrer to it, and the verdict must be referred to the counts which are good.

In no aspect of the case, was it permissible to give evidence of the reputation of the house in which the defendant lived. To support the first count, it was permissible for the State to prove the reputation of the inmates of the house. *Wooster v. State*, at last term. This count could not, however, be sustained, without proof that the defendant governed and managed, or aided and assisted in governing and managing the house. It is not enough that she was an inmate of the house, and there for the purposes of prostitution. The offense consists in *keeping* a house of ill fame, resorted to for the purposes of prostitution, not in residing in such house, without having control over it.

The second count could be supported only by proof that the defendant was a common prostitute, and had no honest employment whereby to maintain herself. The two facts must concur, and must be shown by legal evidence. The bad character of the defendant is not admissible, in the first instance, as a fact showing she was a common prostitute. *State v. Hurd*, 7 Iowa, 411. It may be shown that she resided in a house kept for prostitution; that she was visited by lewd and disorderly persons, and that her associates were persons of ill repute. These are all facts, tending to show she was a common prostitute; and their sufficiency to prove the fact is for the consideration and determination of the jury. All unfavorable inferences, arising from these facts, it was permissible for the defendant to remove, so far as the jury may regard them as removed, by evidence that her health and physical condition rendered prostitution improbable, if not impossible.

It is unnecessary to extend this opinion by an application of these rules to the several rulings of the County Court. They were inconsistent with them, and the judgment must be reversed, and the cause remanded; the prisoner remaining in custody until discharged by due course of law.

[Jones v. The State.]

## Jones v. The State.

### *Indictment for Resisting Officer.*

1. *Resisting officer; what constitutes.*—Resisting or striking a constable when commanding the peace, there being no writ or process in his hands, is not resisting an officer in the execution of legal process (Code of 1876, § 4137), though it may be an assault and battery.

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FROM the County Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

This prosecution was commenced in the Circuit Court, and was transferred to the County Court under the provisions of the act approved February 9, 1877.—Session Acts, 1876-7, p. 149. The indictment contained but one count, which charged that the defendant "did knowingly and willfully oppose or resist Greene McMullen, a constable of said county, in attempting to command the peace." The defendant demurred to the indictment, on the ground that it showed no offense, but the court overruled the demurrer; and he then pleaded not guilty. On the trial, which was had before the judge, without the intervention of a jury, the constable testified that, while he was attempting to stop a fight between the defendant's brother and another person, and after he had commanded the peace, the defendant resisted and struck him; and the court thereupon found the defendant guilty, and fined him fifty dollars; to which judgment he reserved an exception.

NICH. DAVIS, for the defendant.

JOHN W. A. SANFORD, Attorney-General, for the State.

STONE, J.—Under the proof in this record, the defendant may have been guilty of an assault and battery; but neither the indictment nor the evidence shows an offense under section 4137 of the Code of 1876. To come within that statute, the offender must knowingly and willfully oppose or resist an officer of the State, "in serving, executing, or attempting to serve or execute a *legal writ*, or *process*." There was no writ or process in this case.

The judgment of the County Court is reversed, but the cause will not be remanded. Let the defendant be discharged.



[Hanna v. The State.]

## Hanna v. The State.

### *Prosecution for Bastardy.*

1. *Bond for appearance in court.*—The statutory bond required by the justice of the peace, before whom proceedings in bastardy are instituted (Code of 1876, § 4072), is only intended to secure the defendant's appearance in court to answer the charge, and, having served its purpose when he has appeared, he can not then be heard to question its sufficiency; nor is the bond invalid, because it does not particularly describe or identify the case (§ 4853), when the affidavit and warrant, returned with it, show to what particular case it applies.

2. *Examination of complainant by justice.*—When a bond has been taken by the justice, conditioned for the defendant's appearance in court to answer the charge, as required by the statute, and the bond is returned and filed in the court, this is sufficient to show that the necessary preliminary examination was had before him, and to confer jurisdiction on the court to proceed with the case.

3. *Infancy of female complainant.*—Although the proceeding is instituted by the affidavit of the mother, and costs may be adjudged against her, if a verdict is found for the defendant; yet, the prosecution being conducted in the name of the State as plaintiff, the infancy of the mother is immaterial, and does not render necessary the interposition of a next friend for her.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LOUIS WYETH.

The record in this case shows that, on the 10th July, 1877, Louisa J. McAnally, a single woman, appeared before a justice of the peace of said county, and made oath that she was delivered of a bastard child in said county on the 30th May, 1877, and that Frank A. Hanna was the father of said child; that the justice thereupon issued his warrant for the arrest of said Hanna, under which he was arrested by a constable; that on the 20th July, 1877, the said Hanna executed a bond, with sureties, which was approved by the said justice, by which he agreed "to pay the State of Alabama seven hundred and fifty dollars, the sum prescribed by the magistrate, unless the said Frank A. Hanna appears at the next term of the Circuit Court of Blount county, and from term to term thereafter until discharged by law, to answer a prosecution and complaint in bastardy;" and that said affidavit, warrant, and bond were by the justice returned to the Circuit Court, where they were filed by the clerk. The defendant appeared in the Circuit Court, by attorney, and moved to quash and dismiss the proceedings, on the ground that the bond was insufficient to bring into exercise the jurisdiction of said court, and the court had no jurisdiction;

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which motion the court overruled. The defendant then moved to dismiss the proceeding, on the ground that said complainant was an infant under twenty-one years of age, and to require her to give security for the costs for the same reason; which motions also were overruled by the court. The defendant then filed a plea in abatement, averring that the complainant was under twenty-one years of age, and had not sued by next friend, nor given security for the costs; to which plea a demurrer was sustained by the court. An issue was then made up under the direction of the court, between the State as plaintiff and said Hanna as defendant, as to the paternity of the child; and the issue having been found by the jury against the defendant, he was required by the court to enter into bond, conditioned as required by the statute, for the support and maintenance of the child. The defendant reserved exceptions to the overruling of his several motions; and the bill of exceptions states that, on the hearing of said motions to dismiss, the original papers returned by the justice were the only evidence adduced, and the infancy of the complainant was admitted. The overruling of the motions to dismiss, and the judgment on the demurrer to the plea in abatement, are now assigned as error.

C. F. HAMILL, for the appellant.—Proceedings in bastardy are statutory and penal, and the requisitions of the statute must be strictly complied with. As to such proceedings, the Circuit Court is not a court of general jurisdiction, and its records must show every fact necessary to uphold the jurisdiction. The bond taken by the justice of the peace is void: it nowhere identifies the case in which it was taken, nor does it show that it was required by the justice after an examination and hearing, or that the defendant waived such examination. These things were essential to the jurisdiction, and ought to have been shown; and no effort was made to supply these defects of the bond. But the deficiencies of the bond could not be supplied, since the statute in reference to recognizances (Code of 1876, § 4853) does not apply to such a case. The bond was a nullity, and the proceeding ought to have been dismissed.—*Seale v. McClanahan*, 21 Ala. 345; *Judge of Limestone County Court v. Kerr*, 17 Ala. 328; 21 Ala. 772; *Gunn v. Howell*, 27 Ala. 663; *Wilson v. Judge of County Court*, 18 Ala. 760. The defendant had a right to appear, and move to dismiss the case, and was not compelled to wait until the bond was forfeited before he could attack its validity; hence, his appearance was no waiver of the defects in the bond.

2. If the issue had been found in favor of the defendant,

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judgment for costs would have been rendered against the complainant; yet, she being an infant, such a judgment would have been erroneous, and liable to be set aside on motion.—Tyler on Infancy, 52, 65, 192-4, 204-06. Hence, the interposition of a next friend or guardian was necessary.

JOHN W. A. SANFORD, Attorney-General, for the State.—The bond was only intended to secure the defendant's appearance in court; and having fulfilled its purpose when the defendant appeared, its sufficiency or insufficiency was immaterial. Besides, the case was sufficiently identified by the affidavit and warrant, which were returned with it. The prosecution being conducted in the name of the State, and the female complainant being only a witness, her infancy was outside of any issue that could arise.—*Pruitt v. Judge of County Court*, 16 Ala. 705.

MANNING, J.—Upon affidavit of one Louisa J. McAnally, a single woman, that she had been delivered of a bastard child in Blount county, and that appellant was the father of the child, he was brought, by a warrant issued thereupon, before a justice of the peace of said county, and entered into an undertaking of bail to appear at the next term of the Circuit Court of the same county, "to answer to a prosecution and complaint in bastardy." The proceedings were under the statutes embraced in chapter 6, beginning with section 4071 (4396) of the Code of 1876, and "conducted in the name of the State as plaintiff, and accused as defendant."—§ 4092. The charge against him was filed in the name of the State, by its solicitor, and over his signature; and the defendant, appearing in person and by counsel, moved to quash the proceedings; alleging that the bond was not sufficient in law to bring into exercise the jurisdiction of the Circuit Court, and that no examination was shown to have been had by the magistrate.

1. One of the points made is, that the bond fails to identify the case to which it refers. To this there are two answers. The prosecution is initiated by the affidavit, or "complaint on oath" (§ 4071) of the mother of the bastard child; which affidavit is not objected to, as in any respect insufficient. It describes an offense, of which the Circuit Court, a court of general jurisdiction, has cognizance, to compel the father to secure a provision, prescribed by statute, for the child; and the bond required by the justice of the peace is only a method of compelling the defendant to appear in court, to answer to the charge to be made on behalf of the State, against him. When he has done this, the bond



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has served the purpose for which it was taken ; and not being forfeited, no question of its sufficiency can arise. And secondly, according to section 4853 (4245) of the Code of 1876, the bond is not invalid, "although the offense, judgment, or other matter, is incorrectly described in such undertaking ; the particular case, or matter, to which the undertaking is applicable, being made to appear to the court." The particular case is here shown by the affidavit, which was filed by the magistrate, with the bond, as the statute requires (§ 4073), and with the warrant, in the Circuit Court.—See *The State v. Eldred*, 31 Ala. 393 ; and *Vassar v. The State*, 32 Ala. 586.

2. The other objection is, that the jurisdiction of the Circuit Court did not attach, because it nowhere appears that the defendant was brought before the justice of the peace, and an examination thereupon had by him, upon which he required the bond to be given. It has never been usual, in practice, for justices of the peace, in any such cases, when bail-bonds are in fact executed, to make formal entries of judgments, setting forth that, after examination had, just cause was shown why the accused should be bound over to appear at the Circuit Court, to answer for the offense charged against them, and that thereupon they were required to execute such bonds. When the magistrate has taken a bond, and in writing approved it, and filed it in the Circuit Court, this is sufficient evidence that he satisfied himself it ought to have been taken. And according to the terms of the statute (§ 4073), nothing more is necessary to enable the Circuit Court, a court of general jurisdiction, to take cognizance of a cause like the present, than the filing of the bond and affidavit, the latter being the "complaint" mentioned in that section, and the "complaint on oath" mentioned in section 4071. Upon these, the court is authorized to proceed, as in the present instance it did, by causing an issue to be made up, and tried by a jury.

3. The motion to quash being overruled, appellant moved to dismiss the cause, and afterwards filed a plea to have it abated, on the ground that the mother of the child was a minor, and had not appeared by next friend. But she is not the plaintiff. She is only a witness, on whose affidavit, or "complaint on oath," the prosecution by the State is begun ; and although, if the State fail in it, she may be taxed with the costs, this can not be a reason why it should be held that she must make an affidavit by *prochein ami*.

Let the judgment of the Circuit Court be affirmed.

[Glenn v. The State.]

## Glenn v. The State.

### *Indictment for Removing or Selling Mortgaged Property.*

1. *Sufficiency of indictment.*—An indictment which charges that the defendant “did remove, conceal, or sell a horse, the personal property of A. H., for the purpose of hindering, delaying, or defrauding the said A. H., who had a claim to said horse under a written instrument, to-wit: a mortgage, he, the said defendant, then and there having knowledge of the existence of said written instrument or mortgage” (Code of 1876, § 4353), is sufficiently definite and certain.

2. *Verdict of guilty, under indictment containing good and bad counts.*—Under an indictment containing several counts, one of which is good, no demurrer being interposed to the others, a general verdict of guilty will be referred to the good count, and the conviction will be sustained.

3. *Abstract charge.*—A charge requested, which is based, partly or entirely, on a fact of which there does not appear to have been any evidence whatever, is abstract, and properly refused on that account.

FROM the Circuit Court of Marshall.

Tried before the Hon. LOUIS WYETH.

The indictment in this case contained three counts. The first count was in these words: “The grand jury of said county charge that, before the finding of this indictment, William F. Glenn did remove, conceal, or sell a horse, the personal property of Albert Henry, for the purpose of hindering, delaying, or defrauding the said Albert Henry, who had a claim to said horse under a written instrument, to-wit: a mortgage; he, the said William F. Glenn, then and there having knowledge of the existence of said written instrument or mortgage; against the peace,” &c. There was no demurrer to the indictment. The defendant pleaded not guilty, and issue was joined on that plea. The jury returned a verdict of guilty, and the court thereupon sentenced the defendant to imprisonment in the penitentiary for the term of two years. On the trial, the defendant reserved a bill of exceptions to the refusal of a charge asked by him in writing, which requires no special notice. After conviction, he made a motion for a new trial, and also moved in arrest of judgment, on account of the insufficiency of the indictment; and reserved exceptions to the overruling and refusal of these motions.

No counsel appeared in this court for the prisoner, so far as the record and docket show; and no brief is on file.

JOHN W. A. SANFORD, Attorney-General, for the State.

[The State v. McAllister.]

STONE, J.—No assignment of errors, or brief of counsel, has been furnished for appellant in this cause; and we are left to examine the records ourselves, to ascertain if the Circuit Court committed any error, to the prejudice of the prisoner. We think the first count of the indictment clearly good, for it contains all that is requisite to constitute the statutory offense.—Pamph. Acts 1874-5, p. 259. That count being good, and the verdict of the jury a general finding, that finding must be referred to the good count.—1 Brick. Dig. 501, § 761. Hence, we need not inquire whether the second and third counts are good.

The charge refused, to which an exception was reserved, postulates at least one fact, of which the record contains no evidence. The charge asked is, "If the jury believe, from the evidence, that at the time the defendant fled from the county, he had not formed the design to defraud, hinder, or delay his creditors; but that subsequent thereto, and *when in Cherokee, Alabama*, such design or intention was formed, and consummated in the State of Georgia," &c. There is no evidence that defendant was, at any time, in Cherokee county. "A charge based, partly or entirely, on a state of facts of which there does not appear to have been any evidence, is abstract, and should for that reason be refused;" and the court does not inquire whether such statement of fact, stated without evidence to support it, is material or not.—1 Brick. Dig. 338, § 41.

The Circuit Court did not err in refusing to give the charge, and its judgment is affirmed.

## The State. v. McAllister.

### *Summary Proceeding by Garnishment, at suit of Tax-Collector.*

1. *Jurisdiction of court.*—A summary proceeding by garnishment at the suit of a tax collector, under the revenue law of 1868 (§ 53), could only be instituted before a justice of the peace; and there is no authority for extending the provisions of the law to the Circuit Court, in cases which exceed the jurisdiction of a justice. (Changed by statute, Code of 1876, § 416.)

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. J. B. MOORE, as special judge, selected by the parties on account of the incompetency of Hon. W. B. WOOD, presiding judge of the circuit.

The proceeding in this case was instituted on the 25th of



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August, 1874, by a garnishment issued by the clerk of said court, on the affidavit of Jesse Thomas, the tax-collector of said county, which stated that John W. McAllister, as the executor of the last will and testament of John S. Wilson, deceased, was indebted to the State of Alabama in the sum of \$228.79, for taxes levied and assessed for the year 1873; and that Samuel Kirkland was indebted to said McAllister, or had in his possession property or effects belonging to said McAllister, which he prayed might be subjected to the payment of said unpaid taxes. The garnishee appeared, and moved to dismiss the garnishment, on the ground that the court had no jurisdiction of such a proceeding; and a similar motion was also submitted on the part of said McAllister, who also pleaded the want of jurisdiction. The court sustained the motion and plea, and dismissed the garnishment; and its judgment is now assigned as error. A similar garnishment was sued out in the name of Lauderdale county, for taxes due the county, and was disposed of in the same manner; and the two cases were here argued and submitted together.

W. J. WOOD, for the appellant.

E. A. O'NEAL, and R. O. PICKETT, *contra*.

BRICKELL, C. J.—The revenue law of 1868 provided special remedies for the collection of taxes from delinquent or insolvent tax-payers; and among others, a proceeding in the nature of a garnishment, against debtors to, or persons supposed to have in their possession property or effects belonging to such tax-payers. Jurisdiction of this proceeding was limited to justices of the peace; for what reason, or whether from mere inadvertence, it is not our province to inquire. We are without power to extend the jurisdiction to other tribunals, though the remedy before the justice may be inadequate, and though the taxes may exceed in amount the jurisdiction of the justice, as defined by the constitution. The defect in the statute has now been corrected; and justices have jurisdiction of the proceeding, when the amount of the tax does not exceed one hundred dollars; and if it exceeds that amount, the City or Circuit Court has jurisdiction.—Code of 1876, § 416.

The Circuit Court did not err in quashing the garnishment, and the judgment must be affirmed.

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## Hutton et al. v. Williams et al.

### *Bill in Equity for Settlement of Guardianship and Administration.*

1. *Settlement of guardian's accounts in Probate Court; effect of.*—A settlement by a guardian with the Probate Court, after the ward has attained his majority, without the appearance of the ward in person, by attorney, or by guardian *ad litem*, whether it be void, voidable, or only irregular, is an admission of record by him of his indebtedness to the ward, for the sum shown to be in his hands; and so, an account of the hiring of his ward's slaves, filed in said court, is a similar admission, rendering him liable to account for the hires.

|    |     |
|----|-----|
| 60 | 107 |
| 61 | 56  |
| 67 | 274 |
| 69 | 272 |
| 70 | 347 |
| 73 | 45  |
| 82 | 226 |

2. *Liability of guardian and administrator, when offices are united in same person.*—When an administrator becomes guardian of one of the infant distributees of his intestate's estate, he does not hold the ward's distributive interest as guardian, until it has been separated and distinguished from the other assets in his hands as administrator; but, when a guardian, whose authority has terminated by the majority of the ward, afterwards becomes administrator of the ward's estate, not having settled his accounts as guardian, his liability as guardian ceases by operation of law, and he becomes liable as administrator; and a subsequent settlement of his guardianship, made by him in the Probate Court, though void as a judicial proceeding, is an election by him to hold and account for the estate as administrator.

3. *Probate decree on settlement of administrator's accounts; conclusiveness of.* A decree rendered by the Probate Court, on the final settlement of an administrator's accounts, is as valid and conclusive as a decree in chancery on a bill for an account, except so far as the statute authorizes a court of equity to intervene for the correction of errors of law or of fact.

4. *Misjoinder of complainants.*—Where two or more persons join as complainants in a bill, all must be entitled to relief, or the bill must be dismissed as to all.

5. *Infancy as ground of defense or relief against decree.*—Infancy is a personal privilege, available only to the infant himself, or his personal representative: a decree may be voidable by him, while valid and binding on all other parties; in which case, they can not invoke his infancy to protect them against the operation and effect of the decree, nor join with him in a bill for relief against it.

6. *Probate decree on settlement of administrator's accounts; validity of, as affected by omission to file list of heirs, and want of parties.*—The failure or omission of the administrator to file a list of the heirs and distributees of the estate, as required by the statute (Code of 1876, § 2509), does not render the decree on the settlement of his accounts invalid, nor even erroneous; and if the decree ascertains the amount of his indebtedness, and the credits to which he is entitled, showing a balance in his favor, it is valid and binding until reversed, although no execution could issue on it.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 25th March, 1873, by Emmett C. Hutton and Mary E. Hutton, the latter suing as administratrix of the estate of her deceased husband, Aquilla

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D. Hutton, who was a brother of said Emmett C.; against David H. Williams, as guardian and administrator of the estate of William B. Hutton, deceased, who was a brother of said Emmett C. and Aquilla D.; and also against Eugenia Williams, the wife of said David H., who was a sister of said Emmett and Aquilla, and Aurelius Hutton, another brother; and against Whitfield Walker, as a debtor of said D. H. Williams. It sought a settlement and account of the estate of said William B. Hutton in the hands of said D. H. Williams as his guardian, and also as his administrator; or to surcharge and falsify the settlements which he had made, at different times, with the Probate Court of said county, from which he derived his letters as guardian and as administrator. The allegations of the bill, and the prayer for relief, except as to names, dates, and amounts, were almost identical with the case of *Hutton v. Williams*, *post*, which see.

William B. Hutton, the settlement of whose estate was the matter in controversy, was killed at the battle of Chancellersville, in Virginia, on the 3d May, 1863; but there is some mistake in the record, or some uncertainty, as to the date of his birth. In the "Family Record" contained in the Bible, which was made an exhibit to the answer of D. H. Williams, it is stated that he was born on the 20th November, 1843; but this is probably a clerical mistake, since the entry of his death states that he was then twenty-two years, two months, and eighteen days old, which would show that he was born on the 15th February, 1841; and it is stated in the record in several places, by different members of the family, that he was born on February 15, 1841. Said D. H. Williams was appointed his guardian on the 2d January, 1854, and made several partial or annual settlements of his guardianship. By an annual settlement made on the 10th January, 1861, a balance of \$1,145.92 was ascertained to be due from him to his ward; and by another annual settlement, made on the 6th December, 1862, the balance in favor of his ward was stated at \$1,575.50; but no guardian *ad litem* was appointed for the ward on either of these settlements, nor was he present in person or by attorney. On the 13th April, 1863, the guardian filed in the Probate Court an account of the hire of the ward's slaves for the year 1863, which was under oath, and which stated that the guardian had himself hired three of the slaves for \$110, and had hired out a negro woman and her five children for \$25; and it was ordered by the court "that the same be received and recorded." On the death of said W. B. Hutton, who had never married, his heirs and distributees were his brothers and sisters, Eugenia Williams, Aquilla D., Aurelius, and Emmett C., above named.



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Letters of administration on his estate were granted by said Probate Court to said D. H. Williams, on the 26th October, 1863, and he duly qualified, and gave bond; and on the 10th March, 1864, having previously filed his accounts and vouchers for a final settlement of his guardianship, the court rendered the following decree:

"This being the time to which has been continued for D. H. Williams, guardian of W. B. Hutton, a minor, to make a final settlement of his said guardianship, the case being called, and the settlement coming on to be made, came the guardian in his own proper person; and the court being satisfied that due and legal notice of the filing of the guardian's accounts and vouchers, and of the time set for making said settlement, has been given by publication," &c., "as required by the former order of this court; whereupon the court proceeded to audit said account, and, after due examination of the same, and consideration of the vouchers, the court stated said account; and it appears from the same, as thus stated, that the receipts of the guardian up to the 1st January, 1863, including the amount due the ward on the last annual settlement, interest, and hire of slaves, amounted to the sum of \$1,832.22, and that his disbursements up to the 1st May, 1863, supported by good and legal vouchers, passed and allowed him by the court, including amount allowed guardian for commissions, court costs, &c., amounted to \$105.75, which being deducted from the receipts leaves a balance of \$1,626.47 in the hands of the guardian; and the same is hereby decreed by the court to be retained by D. H. Williams as administrator, he having been heretofore regularly appointed by this court as such."

On the 31st March, 1864, said Williams, as administrator of W. B. Hutton, reported to the court that he had in his hands, on the 22d March, 1864, the sum of \$1,600 in treasury-notes of the Confederate States, assets of said estate, and that, "not being able to invest the same otherwise, or to apply the same in payment of debts, he had funded the same, on said 22d March, 1864, in four per cent. bonds of the Confederate States;" that by mistake on the part of his agent, who acted for him in the matter, the said sum, with other moneys which he held as guardian of several infants, was invested in the name of said D. H. Williams individually, and not as administrator and guardian, as it ought to have been; and he asked that he be allowed proper credits for these investments, on settlement of his accounts as guardian and administrator. On the filing of this report, it was ordered by the court, "that the same be received and recorded." On the 5th February, 1866, having previously filed his ac-

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counts and vouchers for a final settlement of his administration, the following decree was rendered by the court: "This being the time to which has been continued the final settlement of the administration of the estate of W. B. Hutton, deceased, by D. H. Williams, the administrator, the case being called, and the settlement coming on to be made, the administrator came in his own proper person; and the court being satisfied that due and legal notice has been given of the filing of the accounts and vouchers, and of the time set for making said settlement, as required by law, and the previous order of this court, viz., by publication for three weeks in the *Whig and Observer*, a weekly newspaper published in the county; whereupon, the court proceeded to examine and audit said account, and, after due examination of the same, and consideration of the vouchers, proceeded to state, and stated said account; and from the same, as stated, it appears that the receipts of the administrator, up to the day of this settlement, amounted to the sum of \$1,630.87, and that his disbursements up to the same time, supported by good and legal vouchers, passed and allowed by the court, amounted to \$99.75, which, when deducted from the amount of receipts, leaves a balance of \$1,531.12 due the estate. The four per cent. bonds are considered worthless by the court." In the account as stated, on which this decree is founded, the only items charged against the administrator are: "Amount due Jan. 1, 1864, \$26.47; amount in four per cent. Confed. bond, \$1,600—\$1,630.37;" while the credits are \$99.75, and the balance is thus stated: "Balance due, and the four per cent. Confed. bond worthless, as is considered by the court, \$1 531.12."

Aquilla D. Hutton was born on the 20th November, 1843, and died some time during the year 1870; and letters of administration on his estate were granted on the 14th February, 1871, to his widow, Mary E. Hutton, one of the complainants. Emmett C. Hutton, the other complainant in the bill, attained his majority on the 4th May, 1871. The bill alleged that each of the settlements above named was null and void; that no guardian *ad litem* was appointed to represent the infants; that no list of heirs and distributees was filed by the administrator on said final settlement; that he had wasted the funds and assets of the estate, and converted them into worthless Confederate securities; that he had failed to account for divers sums with which he ought to have been charged, and had been allowed credits for expenditures which were exorbitant and illegal; but no particular items, on either side of the account, were specified. The prayer was, that the said several settlements be set aside



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and held for nought, or be opened, surcharged, and falsified, and that said D. H. Williams be compelled to account as guardian and administrator of said W. B. Hutton and his estate.

An answer to the bill was filed by D. H. Williams, denying all the charges of misconduct on his part in the management of the estate, and insisting on the correctness and validity of his several settlements. He alleged that, at the time of his settlement as guardian on the 6th December, 1862, his ward, W. B. Hutton, was of full age, and was afterward fully informed of the settlement, and ratified and approved it, and constituted said Williams his general agent to attend to all his business during his absence in the army, as shown by several letters which he wrote to respondent, and which were made exhibits to the answer; that he also authorized and approved the investment in Confederate bonds, as shown by another letter, which was lost; that at the time of the final settlement as administrator, in February, 1866, A. D. Hutton was of full age, and was personally present, and acted as guardian *ad litem* for Emmett C., and assisted in the calculations, and fully approved the settlement. He insisted by way of plea, as well as answer, that A. D. Hutton was concluded and barred by said final decree, and therefore his administratrix was also concluded; and he demurred to the bill for want of equity, because it did not sufficiently specify errors and mistakes in said final decree, and because it was not filed within two years after the rendition of said final decree.

The following are extracts from the letters exhibited with the answer, dated respectively February 20, March 31, and April 6, 1863: "On yesterday, I received a letter from *Reelie*, stating the whereabouts of my negroes at present, as well as a request from you for instructions how to act in a certain case with regard to the present situation of affairs. Considering the hardness of the times, I feel myself fully satisfied, so far as I have been informed. Unused to the power of instruction, which a maturity of years has at a very unfortunate time thrown into my hands, I deem it best, however opposed to your own wishes on the subject, to rest the whole matter in your hands, until, freed from the shackles of the war, I shall be able to join you again. You will then, in future, as heretofore, deal with what little property I have left, in that manner which seems to you to best redound to my interest. I am satisfied that your superior acquaintance with it, as well as with business matters in general, will enable you to turn it to a better account than any instructions I might give. I am glad, however, to see that you are



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unwilling to act without instructions, being confident that it arises from a conscientious policy [*feeling?*] It is my wish that you send me, at as early day as possible, a general statement of my effects. The object of this paper will be a condensed summary of my debts and credits. Write an approximate estimate of my effects. I am fearful that I have about come to the verge of bankruptcy, so heavy have been my expenditures of late years." "From your letter it seems, that my financial condition is far better than my most ardent expectations had led me to believe; that is, if I am to understand from your letter that I am not only clear of all debt, but that there is due \$1,676.50 besides. I think this is the plain interpretation of your letter. I wish you, however, to assure me in your next of this view of the matter. I wish then, with this view of the affair, here to place upon record, for your future gratification, my full satisfaction with your conduct of my business, at the same time that I can only wonder you have succeeded so well." "I received a letter from your brother a few days ago, in reply to one from me asking him for a statement of my business affairs. I was much pleased with his statement. He brings me out of debt, with \$1600, besides my negroes. I must express my surprise how such could be the case, when my schooling has been so heavy. It is solely due to his financial powers."

There was an attempt to amend the bill, by specifying errors and mistakes in the settlements; but the amendment requires no special notice. The chancellor overruled the demurrer to the bill, but, on final hearing, on pleadings and proof, dismissed the bill, holding that the complainants had failed to make out a case for relief. From this decree the complainants now appeal, and here assign it as error.

WATTS & SONS, for appellants.—1. The settlement of the guardian's accounts by the administrator, in March, 1864, was void for want of jurisdiction—it was and is a nullity, and will not even support an appeal.—*Cockrell v. Hays*, 41 Ala. 75; *Carswell v. Spencer*, 44 Ala. 204; *Baldwin v. Deming's Adm'r*, 51 Ala. 553.

2. The settlement of the administrator's account, in 1866, was entirely *ex parte*. No list of heirs and distributees was filed, as required by the statute (Code of 1876, § 2509), and no parties were brought in. It does not purport to discharge the administrator, and is not rendered in favor of, or against any one. It has none of the requisites of a final decree, and would not support an execution.—*Willis v. Willis*, 16 Ala. 652; *Watt v. Watt*, 37 Ala. 543.

3. The investment in Confederate bonds was without

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authority. The intestate's letters could not authorize it; because the investment was made in March, 1864, while he died in May, 1863; and his death was a revocation of the agency, or power of attorney. Nor did the law authorize such investment.—*Lockhart v. Horn*, 17 Wallace, 570.

4. The settlements being void, the complainants were entitled to a general account of the estate, whether the bill was sufficient to surcharge and falsify the settlements or not. *Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, 53 Ala. 615.

SNEDECOR & COCKRELL, and W. COLEMAN, *contra*.—1. The intestate, W. B. Hutton, was fully informed of the settlement made in December, 1862, and ratified and approved it; and he afterward appointed Williams his general agent, with full power to transact all his business. No fraud being shown, the intestate himself was concluded by the acts of his agent, and the distributees of his estate are equally concluded.—20 Ala. 313; 38 Ala. 208; 39 Ala. 33; 19 Ala. 430; 16 Ala. 714; 21 Ala. 534.

2. The final settlement of the guardianship was not void, because the guardian was also administrator of the estate. The court had jurisdiction of the subject-matter, and of the parties, and its decree is valid until reversed, or only voidable.—*Bruce's Executor v. Strickland*, 47 Ala. 199; *Carswell v. Spencer*, 44 Ala. 205.

4. It was the duty of the court to appoint a guardian *ad litem* for the infants; but the failure to do so would, at most, only render the decree voidable, and valid until reversed.—*Kavanaugh v. Thompson*, 16 Ala. 817; *Frierson v. Travis*, 39 Ala. 150; 47 Ala. 196; 16 Ala. 49,509, 693; 22 Ala. 478; 28 Ala. 265; 21 Ala. 522. If the decree be void as to the infant complainant, it is nevertheless binding and conclusive on the adult parties.

5. The failure to file a list of the heirs and distributees did not affect the validity of the decree.—*Clack v. Clack*, 20 Ala. 462.

6. As a bill to surcharge and falsify the settlement, the bill is fatally defective.—*Cowan v. Jones*, 27 Ala. 317; *Story's Eq. Pl. §§ 800-01*; 1 Daniel's Ch. Pr. 424; 2 *Id.* 765; 36 Ala. 720. Besides, it was barred by the statutory limitation of two years.—Code of 1876, §§ 3837-39.

BRICKELL, C. J.—We do not find it necessary to consider the questions touching the regularity and validity of the settlements of his guardianship made by Williams in the Court of Probate, which are so elaborately discussed by counsel. The majority of the ward terminated the guardian-



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ship, and emancipated him from legal disability. Williams' authority as guardian ceased, and the duty resting upon him was a surrender to the ward of his estate, and a full accounting for the administration of it during the period of the guardianship.—Schouler's Dom. Rel. 423. The settlement made by Williams on the 6th day of December, 1862, may be irregular, or it may be void, and incapable of supporting an execution against him and his sureties; it is, nevertheless, an admission of record, that he was of that day, a day subsequent to the ward's majority, indebted to the ward in the sum of fifteen hundred and seventy-one 50-100 dollars. *Hughes v. Mitchell*, 19 Ala. 268. The account of the hire of the slaves of the ward for the year 1863, filed in the Court of Probate on the 13th of April of that year, was also an admission, that, though his authority as guardian had terminated, he had, as the bailee or agent, or without authority of the ward, hired the slaves for that year, rendering him liable to account for the hire.

2. On the death of the ward, and the appointment and qualification of Williams as his administrator, the duty of collecting and receiving the balance he had admitted to be due on the settlement in the Court of Probate, and the hire of the slaves for 1863, and also the duty of demanding possession of the ward's estate, and a full account of its administration, devolved on Williams. On him, also, rested the obligation of making payment, and of surrendering and accounting. The duty and obligation coexisting in the same person, the presumption of law is, the duty was performed, and the obligation discharged. Liability in the capacity of guardian, or of bailee or agent, or even as a tortfeasor, was extinguished, and liability to the extent of that liability in the new capacity of administrator was incurred.—*Ragland v. Calhoun*, 36 Ala. 606; *Whitworth v. Oliver*, 39 Ala. 286; *Collier v. Windham*, 27 Ala. 291. The general principle is, that if the offices of executor or administrator, and of guardian, are united in the same person, and the guardian, in that capacity, can acquire possession only from the executor or administrator, as guardian he does not hold the assets until they are separated and distinguished from the assets held as executor.—*Davis v. Davis*, 10 Ala. 299. The principle involves the existence, at the same time, of two distinct fiduciary relations. In the present case, as we have said, the guardianship had expired before the death of the ward, and there remained in the guardian no authority; and the only duty with which he was charged, was that of surrendering the estate to the ward, and accounting for its administration. On his appointment as administrator, no act was



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necessary to transfer to his new capacity the liability incurred as guardian,—it was transferred by operation of law. If any such act was necessary, the settlement of his guardianship made in 1864, after his appointment as administrator, though it may be void as a judicial proceeding, was an election to hold the estate, and to account for it as administrator.—*Davis v. Davis, supra; Whitworth v. Oliver, supra.*

3. Holding the estate as administrator, and in that capacity answerable for his liability as guardian, the final settlement of the administration, made in 1866, involved a full and complete ascertainment of that liability. The final settlement of an administration in the Court of Probate, necessarily involves a final adjustment of the accounts of the administrator, charging him with all wherewith by law he is chargeable, and crediting him with all wherewith he should be credited. The decree rendered thereon is as valid, and of the same conclusive operation, as the decree of a court of equity, rendered on a bill seeking from him an account, or on a bill filed by him for an account, except so far as the statute authorizes a court of equity to intervene for the correction of errors of law or of fact.—*King v. Smith*, 15 Ala. 264; *Allman v. Owen*, 31 Ala. 167; *Moore v. Lesueur*, 33 Ala. 243; *Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, 53 Ala. 615.

4-5. The material inquiry of the case is, therefore, the validity of the decree rendered by the Court of Probate on the final settlement of Williams' administration in 1866. If that decree is valid, it is a bar to this bill, whether it is regarded as a bill filed under the statute for the correction of errors of law or of fact in the settlement (Code of 1876, § 3837), or a bill addressed to the original jurisdiction of a court of equity, to compel an administrator to an account and distribution. It is a bar to the statutory remedy, if the allegations of the bill make a case within the statute; which we do not decide, because filed more than two years after the settlement. The intestate of the appellant, Mary E., was of full age at the time of the settlement, and lived for more than two years thereafter, free from all disability, and as to her the statute operates a bar. The disability of her co-complainant, Emmett C., can not shield her from the effect of the statutory bar. It is a familiar principle in a court of equity, that when two or more join as complainants, all must be entitled to relief, or the suit is not maintainable.—*Otis v. Dargan, supra.* The principle applies to this bill, in either of its aspects. The settlement and decree in the Court of Probate may be invalid as to the complainant, Emmett C., on grounds purely personal to him, and yet valid and operative as to the intestate of the complainant, Mary E. In-

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fancy is a personal privilege, available only to the infant or his personal representative. If it is conceded the failure of the Court of Probate, or rather the failure of the record of the court, to show affirmatively the appointment of a guardian *ad litem*, and his acceptance of the appointment to represent Emmett C., then an infant, would render the settlement and decree void as to him, it would be valid and operative as to all persons of whom the court had jurisdiction. They can not invoke the infancy of another, to protect themselves against the operation and effect of a decree rendered by a court having plenary jurisdiction, so far as they were concerned, to adjudicate finally.—*Walker v. Jones*, 23 Ala. 448.

6. There are but three objections urged against the regularity and validity of the final settlement of the administration and the decree thereon. The *first* is, that the record does not show affirmatively the appointment of a guardian *ad litem* for the infant, Emmett C.; which, if it can be sustained,—and we purposely refrain from expressing an opinion in reference to that point,—is not available to support the present bill. The *second* is, that the record does not show that, on or prior to the making of the settlement, the administrator filed a list of the heirs. This is an omission, which would not avail on error to reverse the decree, and, of course, can not affect it when assailed collaterally.—*Eddings v. Long*, 10 Ala. 203; *Clack v. Clack*, 20 Ala. 461; *Otis v. Dargan*, *supra*. The *third* is, that no decree is rendered in favor of any one, and no execution could have issued on it. It is, nevertheless, clear that the court did ascertain and pass upon the question of the amount with which the administrator was chargeable, and the amount with which he should be credited. The credits, excluding the Confederate bond, which is declared worthless, exceeding the amount charged against the administrator, there could be no further decree—no decree declaring of whom the administrator should recover such balance. A decree rendered under such circumstances is binding until reversed.—*Watt v. Watt*, 37 Ala. 543.

The result is, the decree of the chancellor is affirmed.

[Locke v. Humphries.]

## Locke v. Humphries.

*Action on Promissory Note, by Payees against Makers.*

1. *Statute of frauds; promise to answer for debt of another.*—Where the adult distributees of an estate, on a settlement had with the administrator, charge him with the amount of advances procured by him from a commission-merchant on the credit of the estate, and themselves assume the debt to the merchant; giving their note for the amount, obtaining an extension of the time of payment, and renewing the note on a further extension,—the note is not, within the statute of frauds (Code of 1876, § 2121), a promise to answer for the debt of another.

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APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEORGE H. CRAIG.

This action was brought by Carlisle & Humphries, suing as partners, and revived in the name of H. G. Humphries as surviving partner, against James W. Locke and William H. Locke; was commenced on the 31st January, 1872, and was founded on the defendants' promissory note for \$1,170.38, dated Mobile, January 1st, 1870, payable on the 1st January, 1871, to the order of said Carlisle & Humphries, negotiable and payable at the Bank of Mobile. The defendants pleaded want of consideration, the statute of frauds, and that the note was given for the amount of a debt due and owing by one William Kerr to the plaintiff, and was therefore wholly without consideration on the part of the defendants; and issue was joined on these pleas. The material facts of the case were thus stated by

MANNING, J.—“One Kerr, who had married the widow of John Locke, deceased, of Hale county, was administrator for several years of decedent's estate, and, in that capacity, obtained money and supplies, from time to time, from Carlisle & Humphries, commission-merchants, and sent to them, for sale, the cotton made on the plantations of the estate; the accounts being kept by the merchants with the estate of John Locke. Some of the supplies were gotten for the use of the estate, and others for the use of the family. Appellants, Wm. H. Locke and James W. Locke, were the only children of deceased, and were step-children of the administrator, Kerr; and in 1867, after they had become of age, the plantations, &c., were turned over to them. They continued to deal, as Kerr had done, with Carlisle & Humphries, as the factors of the estate; the accounts between them



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being continued in the name of the 'estate of John Locke.' When appellants took possession and charge of the property, there was a balance due appellees, amounting at the end of the year to over \$2,000; for which sum, they sent a note to appellants, payable nearly a year afterwards, requesting them to sign and send it back. Before that time—in October, 1867—William and James Locke wrote to appellees as follows: 'Dear Sirs—We find it necessary, under existing circumstances, to communicate with you in reference to matters of interest to all parties concerned. In consideration of the depression in the cotton market, and the shortness of the crop, the proceeds of the incoming crop may not be sufficient to pay you the amount advanced for the estate of Locke. General Kerr has drawn about half the amount charged to estate, and used it himself, we receiving none of the benefits of it. However, we propose to pay it all. We have obtained judgment in court against him, for the whole amount of his indebtedness—eight thousand dollars—and the levy in our favor has been made upon his house and premises in Greensboro. We dislike to sell the house at so great a sacrifice, as the present prices would require, in order to pay you, if you can grant us indulgence for another year.

... We would ask indulgence for another year, and are both of us willing to give you all security you may require. I think we can send you forty bags. We have had a final settlement with General Kerr, as administrator of the estate; and he is no longer authorized to make demands for the estate, except as directed by either of us.'

"Delay was granted by the factors, and Kerr discharged from all liability. No claim was ever made by appellees against him. After the business of the year 1867 between the parties was closed, Carlisle & Humphries, on the 4th of February, 1868, sent up a statement of the account, and a promissory note, the same before referred to, for the balance due to them, with interest added, payable about a year afterwards, to be executed by appellants; which note they deferred signing. But afterwards, in the fall of the year, appellants executed two notes of the same date—of February 4th, 1868—one for \$1,143.37, payable 11–14 of December in the same year, which was paid in the course of that winter; and the other for \$1,000, payable 1–4 of December, 1869, with interest from 1st of December, 1868. These notes were made negotiable and payable in bank, and were for the same debt for which the one note had been prepared and sent to them for their signature. In the meantime, Kerr, in 1868, became a discharged bankrupt. The note for \$1,000 was not paid; and in January, 1870, appellants got a further ex-

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tension of the time of payment, and executed to Carlisle & Humphries the note now sued on, payable on the 1st of January, 1871, in lieu of that for \$1,000. In February, 1871, after maturity of the new note, appellants not having paid it, and having been written to for a new note for the amount, payable in the fall following, decline to give it, and say they have been advised by their lawyers that they can not be compelled to pay the present note, and ought not to have given it; but that they are willing to pay it next fall, if the appellees will wait upon them till that time; which they agreed to do. Payment not being then made, this suit was brought, in January, 1872, by Carlisle & Humphries. The only defense to it is, that the note does not express in writing the consideration for which it was given, and is therefore void under the statute of frauds, as an undertaking to pay the debt of another. The circuit judge held that it was not obnoxious to that objection; and his rulings to that effect, in charges given and refused, are now assigned as error.

JAS. E. WEBB, for appellants.—The transactions between Carlisle & Humphries and Kerr, the administrator, imposed no liability on Locke's estate, but only created a personal obligation on Kerr.—*Kirkman v. Benham*, 28 Ala. 506; *Lyon v. Hays*, 30 Ala. 430; *Christian v. Morris*, 50 Ala. 585. When the defendants assumed this liability, their promise was within the statute of frauds, unless there was a new consideration beneficial to them.—*Brown v. Barnes*, 6 Ala. 695; *Martin v. Black*, 20 Ala. 312; *S. C.*, 21 Ala. 728; *Nelson v. Boynton*, 3 Metcalf, 400; *Farley v. Cleaveland*, 4 Cowen, 432; *Barker v. Bucklin*, 2 Denio, 55-61. This construction of the statute of frauds has since received a legislative adoption, being incorporated in the Code of 1852, and in the Revised Code of 1867.—*Duramus v. Harrison & Whitman*, 26 Ala. 326. The renewal of the note did not change the relation of the parties, nor impart any validity to the contract.—*Stark v. Henderson*, 30 Ala. 440; *Finn & Dulany v. Barclay*, 15 Ala. 626; *Edwards on Notes and Bills*, 310; *Parsons on Notes*, vol. 1, 178. Forbearance to sue Kerr was not a sufficient consideration.—*Story on Contracts*, § 120; 11 Sm. & Mar. 437-8; 4 M. & W. 795; 4 East, 455.

THOS. R. ROULHAC, *contra*, cited *Click v. McAfee*, 7 Porter, 66; *Mason v. Hall*, 30 Ala. 599; *Chitty on Contracts*, 28-9; 1 Smith's Leading Cases, 385.

MANNING, J. [After stating the facts]—We think there was no error in the ruling of the circuit judge. Appellants



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having received from Kerr, administrator, the property of their father's estate, and had a settlement with him of his administration, in their letter of October, 1867, inform Carlisle & Humphries thereof, and of their purpose to pay them the balance of the debt contracted by Kerr, the late administrator, recognizing their obligation to do so, as arising out of the settlement with Kerr, in the Probate Court, and out of their having obtained a judgment on said settlement for the total amount due from him, and a levy upon his property in Greensboro to pay it. They only request, as prices are then low, that they shall not be required to sell the property levied on to pay all of the debt to appellees, at the end of that year, but that they shall be indulged, for so much as they can not pay that winter, until the next year. This being assented to, they pay a part of the debt, and afterwards give their notes for the residue, and renew for another year their note for the sum still unpaid, getting indulgence, through a period of four years, upon these representations and promises.

"The promise of one person to pay the debt of another, made upon a new and valuable consideration beneficial to the promisor, is not within the statute of frauds."—*Mason v. Hall*, 30 Ala. 599.

The facts make this case less obnoxious to that statute, than were the cases *McKenzie v. Jackson*, 4 Ala. 230, and *Mason v. Hall*, *supra*. In the former of those, ORMOND, J., said: "Adams and McKenzie promised Gerald to pay the debt which the latter owed to Jackson, in consideration of receiving the effects of the former firm, which are transferred to them; and subsequently McKenzie, by parol, promises Jackson to pay him, and solicits indulgence. If Gerald, instead of transferring merchandise and debts on other persons, had handed over to McKenzie the amount in money, with directions to pay it to Jackson, it can not be doubted that the person receiving it would be liable on his promise to him; and yet there can be no difference between the two cases."—See, also, *Farley v. Cleaveland*, 4th Cowen, 432.

In the present case, appellants say that the administrator of the estate, against which the debt to appellees had been contracted, has had charged against it too much by about \$1,000; for which the estate was not liable, either to the creditors, or to the administrator, upon his settlement. But, instead of controverting this question with the creditors, the administrator is charged with that sum in their settlement with him, and they obtain judgment and a levy on his property for that much more than they otherwise would be entitled to, and make themselves liable to the payment of the



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debt. This is what they, in effect, communicate in writing to the creditors, in a letter promising to pay the debt due to them, and asking indulgence for a year as to a part; and receiving this, they afterwards execute their notes to the creditors for the unpaid balance. It would be a perversion of the statute of frauds from its proper object, to hold that it invalidated such a contract.

Let the judgment of the Circuit Court be affirmed.

## Marshall v. Croom.

### *Bill in Equity by Creditors, to set aside Conveyances as Fraudulent.*

1. *Issue at law.*—When a question of fact arising in a chancery cause, as of fraud *vel non* in the execution of a deed, is submitted by the chancellor to the decision of a jury, he is not concluded by their verdict; and although he may approve it, and make it the basis of his decree, this court will not be controlled by it, when satisfied from the record that the jury did not arrive at a correct conclusion—that the verdict was formed under a misapprehension of the pleadings, or that it is plainly opposed to the evidence, when considered in connection with the pleadings.

2. *Judgment, as proof of debt.*—A judgment against the grantor is not evidence, as against a prior grantee, of the time when the debt was contracted on which the judgment is founded.

3. *Validity of conveyance by insolvent debtor, to near relative.*—A conveyance by an insolvent debtor, against whom suits are pending, to a son, or other near relative, in form a deed of bargain and sale, and reciting the payment of a valuable consideration, will be closely scrutinized at the instance of his creditors, but it is not necessarily fraudulent; and though executed with a fraudulent intent on the part of the grantor, it will not be set aside as fraudulent and void, unless the grantee had knowledge of such fraudulent intent, and participated in it.

4. *Same.*—In this case, an insolvent debtor, while suits were pending against him, conveyed all his property to his son and daughter, by three separate deeds, all executed within a period of a few months, and reciting the payment of a valuable consideration; and it not being shown that any of the purchase-money was applied in payment of his debts, it was held, that the conveyances were executed by him with intent to hinder, delay, and defraud his creditors; but, as against the daughter, who denied all charges of fraud, and all knowledge of her father's indebtedness, no proof of such indebtedness being adduced, the conveyance to her was held valid: while the conveyance to the son, who also denied all the charges of fraud, but admitted the indebtedness and his own knowledge thereof, and failed to explain satisfactorily how he acquired the purchase-money alleged to have been paid, and other suspicious facts connected with the payment, was set aside as fraudulent.

5. *Same; rents and profits, as against fraudulent grantee.*—When a fraudulent grantee holds the property conveyed to him under a secret trust for the benefit of the grantor, he is responsible to creditors for rents and profits during his possession; but this principle does not apply, where the fraudulent conveyance, which is set aside at the suit of judgment creditors, was intended to vest the beneficial use of the property in the grantee.

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APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 31st July, 1872, by Stephens Croom and others, judgment creditors of Matthew A. Marshall, against the said Matthew A. Marshall, and James B. Marshall and Mrs. Augusta M. Gere, who were his son and daughter; and sought to set aside three deeds, by which said Matthew A. Marshall conveyed substantially all his property to his said son and daughter, on the ground that they were executed with intent to hinder, delay, and defraud the creditors of the grantor. The complainants' judgments, five in number, were rendered on different days, between the 13th October, 1871, and the 25th April, 1872, and amounted in the aggregate to more than \$7,200; and executions on them had been regularly issued, and returned "No property found," before the bill was filed. The first deed to Mrs. Gere was dated the 14th May, 1867, conveyed a tract of land containing eighteen hundred and fifty acres, and recited as its consideration the payment of \$2,500. The second deed to her was dated the 5th October, 1867, conveyed several lots in the town of Gaston, Sumter county, including the grantor's residence, and recited as its consideration the payment of \$1,000. The deed to James B. Marshall was dated the 30th March, 1867, conveyed a tract of land containing ten hundred and eighty acres, and recited as its consideration the payment of \$1,250. All of the deeds contained full covenants of warranty, and were acknowledged by the grantor and his wife, before a justice of the peace, on or about the day of their respective dates; but they were not filed for record until after the lapse of more than a year—the deeds to Mrs. Gere on the 21st February, 1868, and the deed to James B. Marshall on the 6th October, 1870.

The cause having been submitted to the chancellor for a hearing on bill and answer, he held the deeds fraudulent and void, and rendered a decree for the complainants; but his decree was reversed by this court on appeal, at its January term, 1875, and the cause was remanded. After the remandment of the cause, a great deal of testimony was taken by both parties, bearing on the question of fraud; and the cause being again submitted to the chancellor, on pleadings and proof, he ordered a jury to be summoned, and submitted to them the question of fraud *vel non* in the execution of the deeds. The trial being had before the chancellor himself, the verdict of the jury was, that the several deeds were executed with fraudulent intent on the part of the grantor, and that the grantees participated in such fraudulent intent. The chancellor approved the verdict, and rendered a decree for

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the complainants; declaring the deeds fraudulent and void, ordering a sale of the property for the satisfaction of the complainants' judgments, and directing an account to be taken of the rents, income, and profits of the property, during the possession of the grantees respectively. From this decree the defendants now appeal, and they jointly assign it as error.

R. H. & G. L. SMITH, with THOS. COBBS, for appellants, discussed and analyzed the evidence, and contended that it was not sufficient to overcome the sworn denials of the answers. They cited and relied on the former decision rendered in this case, 52 Ala. 554-6, and the case of *Tompkins v. Nichols & Jamison*, 53 Ala. 197-201.

SNEDECOR & COCKRELL, with JAMES COBBS, *contra*.—The pleadings and proof establish a concurrence of all the suspicious circumstances which are regarded as badges of fraud, and which are usually found attending the execution of fraudulent conveyances. The grantor was largely indebted, in fact insolvent, and suits were pending against him. The grantees were his children, and lived under the same roof with him. That they had knowledge of his pecuniary condition, notwithstanding their denials, is shown by a preponderance of the testimony. The deeds conveyed all of the grantor's property, and placed everything beyond the reach of his creditors at law; and notwithstanding his alleged desire to pay his debts, there is an utter failure to prove payment of a single debt. The recited consideration was grossly inadequate. The growing crop and the stock, which passed with the land to Mrs. Gere, were worth at least the full amount of the purchase-money. There was no outward change in the possession of the property, or in the relations of the parties. No change of occupation or residence was contemplated by the grantor, nor was the sale demanded by the infirmities of age: on the contrary, he continued to superintend and carry on all the business of the plantation, professedly as overseer for his daughter. The evidence shows, by a decided preponderance, that neither of the grantees had the means to make the alleged payments; and the payments were attended with suspicious circumstances. The question of fraud was fairly submitted to the jury, and this court will not disturb their verdict. The following authorities are relied on: *Clark v. Wise*, 39 How. Pr. N. Y. 97; *Walcott v. Olney*, 6 McLean, 23; *Atwood v. Impson*, 20 N. J. Eq. 150; 32 Illinois, 150; *Gibson v. Hill*, 23 Texas, 77; *Winchester v. Reid*, 8 Jones' Law, N. C. 377; *Haney v. Nugent*, 13



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Wisc. 282 ; *Owen v. Arvis*, 2 Dutch. N. J. 22 ; *Black v. Caldwell*, 4 Jones' Law, 150.

STONE, J.—When this case was before in this court, it had been submitted without evidence. It was decided here on the pleadings alone. The object of the bill was to set aside three conveyances, made by M. A. Marshall in 1867 ; two to his daughter, Mrs. Gere, and one to his son, J. B. Marshall. The bill was filed by creditors, whose claims were alleged to be older than the conveyances, and it charged that their said claims were reduced to judgment in 1871 and 1872 ; that the lands were sold at a grossly inadequate price ; that no money was in fact paid for the property, but that the conveyances were covinous, and made with intent to delay, hinder, and defraud the creditors of M. A. Marshall. The bill charged, also, that the said conveyances were received by the grantees with like intent to delay, hinder, and defraud the creditors of the grantor ; but, while the bill is very full in charging fraud and covin in these conveyances and other dealings, it nowhere charges that the grantees, when they received the deeds, had knowledge, or notice, that their father was indebted at the time. Neither does it charge that the grantees, at the time they received the conveyances, had knowledge that the intent of the grantor was to delay, hinder, and defraud his creditors, unless that charge be implied in the averments above referred to. The burden of the bill is, that M. A. Marshall owed complainants, and was indebted to insolvency ; that he conveyed the bulk of his property to his children, on a recited consideration that was grossly inadequate ; that nothing was in fact paid ; and that this was done on the part of each, with intent to delay, hinder, and defraud the creditors of M. A. Marshall. Sworn answers were required from the defendants, and they did so answer.

In the opinion of this court it was said : "The charges of fraud, made in the bill, are direct and specific ; and the interrogatories founded thereon, for a discovery, are of a thorough and most searching character. All the charges of fraud, and the interrogatories propounded to each defendant, are fully answered, and each one denies all the allegations imputing fraud ; and the answers are strictly responsive." In another place it was said : "It is certainly true that the answers, in the case before us, disclose facts and circumstances, connected with the conveyances attacked, which are, in contemplation of law, badges of fraud ; but they are not proof sufficiently conclusive of it to overturn the sworn denials of the answers ; especially when the complainants

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have made the answers their own testimony." And, so, this court held that, on the pleadings alone, the charge of fraud was not established.—*Marshall v. Croom*, 52 Ala. 554.

When the case returned to the court below, evidence was taken; and the cause was again submitted for decree, on pleadings and testimony. The chancellor had a jury summoned and impaneled to try the issue of fraud *vel non*; and the jury by their verdict found that each of the three deeds assailed was made with intent to delay, hinder, and defraud the creditors of M. A. Marshall; and the decree of the court was rendered in pursuance of the verdict. It is here contended that, in charging the jury, the chancellor fell into errors, which renders it improper that we should accord to the verdict any weight, in determining the question of fraud charged in the bill.

Issues at law, in cases like the present, are directed, as one means of satisfying the conscience of the chancellor. They rest in the sound discretion of the court in which the cause is pending; and it is not an error which will avail the party aggrieved, either to grant or refuse them. In the matter of the relevancy and legality of evidence, and the principles of law laid down for the guidance of the jury, the same rules obtain as in jury trials in proceedings at law. Here the analogy stops. Unlike trials at law, questions of evidence, or of law, as presented in the charge, can not, as mere legal propositions, be the grounds of reversal in this court. The chancellor is not concluded by such findings, but may decree in opposition to it; may set it aside, award a *venire de novo*, or take the trial of the facts into his own hands, notwithstanding the verdict.—*Atwood v. Smith*, 11 Ala. 894; *Alexander v. Alexander*, 5 Ala. 517; *Dabbs v. Dabbs*, 27 Ala. 646; *Anon.*, 35 Ala. 256; Code of 1876, § 3890, *et seq.* If an issue out of chancery, submitted to, and passed on by a jury, be so presented, as that it does not aid us in arriving at a correct conclusion; or, if it was presented in such manner as to convince us that it was done in a misapprehension of the pleadings; or, if the testimony, in view of the pleadings, is plainly insufficient to support the verdict, then, it would be our duty not to be controlled by such verdict, but to look for other principles on which to rest our decision.

We have stated, above, the general substance and object of the bill. The first five sections charge the date and amount of the several judgments recovered by complainants against M. A. Marshall; some of them being in October, 1871, and the other in April, 1872. The sixth section of the bill charges, that "the causes of action upon which the fore-



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going judgments against the said Matthew A. Marshall were severally rendered against him, were valid and *bona fide* subsisting claims against him, on and before January 1st, 1861, and continuously from said last date have been, and are now valid, *bona fide* subsisting claims against said Marshall." The bill then alleges the issue of executions on said judgments, and return thereon "No property found." Section seven avers, that said M. A. Marshall owned the lands sought to be condemned, on 1st January, 1861, and ever afterwards owned the same. The two deeds to Mrs. Gere bear date, severally, May 14th, and October 5th, 1867. The deed to J. B. Marshall bears date March 30th, 1867. The charge of fraud against Mrs. Augusta Gere is as follows: "That no money was in fact paid by the said Augusta to her father, at, or upon, or in consideration of the said conveyances, as is fraudulently recited in said deeds; that the respective considerations recited in said deeds are, each of them, enormously disproportionate, and shockingly inadequate to the value and quantity of the property severally conveyed therein; that, in point of fact, said Augusta had no money, or property, wherewith to make said purchase; and that the said deeds were executed by said Marshall, and received by the said Augusta, for the purpose of hindering, delaying, and defrauding the creditors of the said Marshall." Substantially the same averment is made as to the deed to James B. Marshall.

It will be observed, that section six of the bill is the one which charges that the debts of complainants dated back to 1861. In Mrs. Gere's answer is the following clause: "That in answer to paragraphs 1, 2, 3, 4, 5, 6, she knows nothing of the matters therein contained, and can not admit or deny the allegations contained." The answer of J. B. Marshall is as follows: "This defendant, in answer to paragraphs numbered 1, 2, 3, 4, 5, 6, says that he does not know whether said allegations are true or not, but he believes they are true, and he therefore admits them." It is thus shown that Mrs. Gere professed ignorance, and therefore did not admit the averments in section six of the bill, the only section which charges that the debts were contracted as early as 1861, and in fact the only section which charges *when* the debts were contracted. Her answer is very full, and denies with particularity every fact and circumstance charged, tending to show fraud in her purchase; denies that the conveyances were made without consideration; and answers and pleads that she paid the recited consideration in full, at the times the deeds bear date, and that such consideration was the full value of the property conveyed. In her answer, she further



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"avers, that at, or before, the respective times of the execution of the said deeds by the said M. A. Marshall to this defendant, and of the payment of said purchase-money, she, this defendant, had no notice whatever of the claim or claims of the said complainants now claimed, or of any incumbrance whatever that in any wise affected the said premises, so purchased by this defendant, or any part thereof." In answer to the charge that the money, with which she paid for the lands, came to her from her father, she says: "Said money came, neither directly nor indirectly, to me from my father, but was the proceeds of my labor and management, in the way I have stated." She had before stated, that she had cotton, and she explained how she came by it. Thirty-four bales of this cotton, she said, she had sold for about four thousand dollars. With this money, she said, she had paid for the lands she had purchased from her father; the gross purchase amounting to thirty-five hundred dollars. She denied that the lands were worth more than this sum.

We deem it unnecessary, in this case, to present or collate either the pleadings or evidence, in determining the question of Matthew A. Marshall's intent in making the several conveyances to his children. That he was largely insolvent, all through the year 1867, is fully shown; and many acts of his, including an entire failure to prove that he applied to the payment of his debts any of the money he received from the sale of his property, leave this transaction in so questionable a shape, that we do not hesitate to pronounce that the several deeds were made with intent, on his part, to delay, hinder, and defraud his creditors. He knew the extent of his indebtedness, was being sued on some of his debts, and must have expected other suits. Yet, under the version of the facts most favorable to him, he disposed, in a few months, and at an unusual season of the year, of all his available property; and we are not able to trace one dollar, of some five thousand dollars received by him, to the payment of his debts. True, he says, in his sworn answer, that he applied some of the money to the payment of his debts; and he mentions Judge Reavis, as the only creditor remembered, to whom he made payment. He exhibits with his answer cancelled notes, payable to Reavis; but they show they were cancelled long before he made the sales in 1867. In view of the pleadings and evidence, we do not hesitate to pronounce that M. A. Marshall's intent in making the deeds was fraudulent.

The alleged sales were made to near relatives—a daughter and a son; and in such case, both law and reason require that we should scrutinize the transaction narrowly.—*OVERTON*

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*v. Morris*, 3 Por. 249; *Anderson v. Hooks*, 9 Ala. 704; *High v. Nelms*, 14 Ala. 350; *Young v. Dumas*, 39 Ala. 60; *Hubbard v. Allen*, at the present term. But it does not follow, that all sales to relations are therefore fraudulent. We have shown, above, that Mrs. Gere, in her answer, fully negatives every charge in the bill, which assails her title. Her answer is very full, and meets and negatives every phase of fact, on which relief is claimed; and the answer being responsive to the bill and interrogatories, and being sworn to, in obedience to the foot-note, this casts on the complainant the necessity of overcoming the denials of the answer by two witnesses, or one with corroboration.

We said, above, that Mrs. Gere expressed ignorance, and did not admit the truth, of section six of the bill, which averred that complainants' claims dated back to 1861. This imposed on the complainants the necessity of proving that averment of their bill, if necessary. They produced in evidence the record of their recoveries in the fall of 1871, and in the spring of 1872; and they offered no other direct evidence of their demands, or of the time when they were contracted. These records are not proof, against Mrs. Gere, that the debts existed before the date of the judgments—1871 and 1872; four or five years after the deeds were made to her.—*McCaskle v. Amarine*, 12 Ala. 17; *Goodgame v. Cole*, 12 Ala. 77; *Simerson v. Br. Bank at Decatur*, 12 Ala. 205.

The only other evidence found in the record, tending to show the existence of the debts, and Mrs. Gere's knowledge of them, is furnished in the deposition of J. E. Westcott, a witness for complainants. All he says on the subject is embodied in the following extracts: "I don't know whether Mrs. Gere or J. B. Marshall knew the extent of their father's indebtedness or not. I don't now recollect hearing them speak of any indebtedness, except as to a debt due C. R. Labuzan and myself. . . . I don't know what means she" [Mrs. Gere] "had of knowing about her father's business, and property, plate, &c., other than any child would have who was living with its parents. Don't know whether they talked over these matters or not. I don't recollect having any conversation with her about these matters. . . . I never heard him" [J. B. Marshall] "say any thing about his father's debts. . . . I did not say that either James B. Marshall or A. M. Croom" [Mrs. Gere] "knew of M. A. Marshall's indebtedness. Have said I never heard them speak of his debts, except a debt due C. R. Labuzan and myself. I can not state that they knew the extent of his indebtedness. I did not know that they knew he was in debt more than he could pay. I think M. A. Marshall was a silent, reserved



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man, with reference to his own matters. . . . I can not state that Mrs. Gere knew about the business affairs of M. A. Marshall. I don't recollect having any conversation with her about these matters."

It is difficult to understand precisely what this witness means. He testified many years after 1867; and if he intends to be understood as affirming that he had a conversation with Mrs. Gere, he gives no date of its occurrence. He twice speaks of a *debt* due to Labuzan and himself. Unexplained, this would seem to imply that the debt was due to them jointly. Yet the record no where shows there was such debt, or that there was any debt due to the witness. But, giving due weight to all the various expressions, we can not say that the witness intended to affirm, as fact, that he had had such conversation with Mrs. Gere. This testimony is too weak and indeterminate to overcome the denials in the answer, and to meet the requirements of the law.

The testimony very fully shows that Mrs. Gere had money sufficient to make the purchase; that she also had fine business qualifications, and ample credit, and that she actually paid the cash when the deeds were executed. There is no attempt to prove the property was sold below its market value. There is a failure to prove, as against her, that the debts of Mr. Marshall existed, until four years after she made her purchases; and from this standpoint, there is an entire absence of proof, or presumption, that the conveyances to her were made with intent to delay, hinder, or defraud the creditors of M. A. Marshall. Whether there was a consideration from her or not, was immaterial under the facts of this case, unless the record contained evidence, which it does not, that the conveyances were made in *actual fraud*, and that Mrs. Gere participated therein; namely, that they were made *with intent* to defraud some creditor then existing, or afterward to be contracted with. The consequence is, that Mrs. Gere's title to the property purchased by her is unquestioned, under the facts shown in this record. 2 Brick. Dig. 18, § 71.

We have shown, above, that J. B. Marshall, in his answer, admitted the truth of the first six sections of the bill. This is an admission that the debts, sought to be enforced in this suit, existed on and before January 1st, 1861. J. B. Marshall, when he made his purchase, March 30, 1867, was under twenty-two years of age. He had been out of the army less than two years. He does not deny that he knew of his father's debts, embarrassment, and the suits against him. In his answer, "he denies that any fraudulent or covinous assignments were made to him. On the contrary, he



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insists, that the conveyance made to him was made in good faith, and for valuable consideration, and that the said deed recites the true consideration. . . . The consideration, upon which the conveyance inquired of was made, was twelve hundred and fifty dollars. I paid five hundred dollars in cash, March 30, 1867, and gave a draft on Messrs. B. & T. due 1st November, 1867, for \$750, which the said Matthew A. Marshall did not present, at my request, as I was already indebted to the said firm, and wanted him to wait and see what prospect I had for a good crop, before presenting the draft for acceptance. Finding I was not making a good crop, I paid him with two notes on Henry Gordon, amounting to \$575, and executed my own note for one hundred and seventy-five dollars, and took up draft. I afterwards paid him the note. I made said money in my business transactions during the two preceding years. I was engaged in business in Gaston, from the summer of 1865, and until the spring of 1867. I realized money by sales, and I at times borrowed money, and repaid it. I also bought and sold cotton; and it is impossible for me to answer with more particularity than I have already answered. . . . Prior to March 30, 1867, I lived in Gaston, Sumter county, Alabama. I was engaged in the family-grocery business, and in farming. I had about twenty-five hundred dollars, the proceeds of nine bales of cotton sold by C. R. Labuzan, at 53½ cents, in 1865. With that money I commenced my business."

The foregoing comprises all the more material parts of this defendant's answer, showing the terms of his purchase, and with what means he made it; and also all the material denials of fraud, so far as his purchase is concerned. It will be observed he offers no explanation, or attempt to show how he acquired the nine bales of cotton, soon after his return from the war, and before he was twenty-one years old. Neither does he attempt to show how he came by the notes on Gordon, amounting to \$575. The witness Derby testified that he, "sometime in 1867—thinks it was after March—heard James B. Marshall speak of his father's affairs, stating that previous to that time he had advised his father to take the benefit of the bankrupt law; and that, if he had taken his advice, his affairs would have been in better condition." Seale, another witness, who was present when the deed to James B. Marshall was executed, testified as follows: "I do not recollect all that was said, but do recollect that M. A. Marshall said, when he delivered the deed to James B. Marshall, 'Now I want the money.'"

We have said, above, that transactions, such as this, should be narrowly scrutinized. We now add, that when a father

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is shown to be indebted to insolvency—so much and manifestly so, that the son advises him to seek relief in the bankrupt law—yet conveys to that son a considerable tract of land, and there is a failure to show that the proceeds of the land, if sold, went to the debts of the father, the law and human reason distrust the *bona fides* of such transaction, if there be suspicious conduct; or, if any fact, necessary to a sale and conveyance in good faith, be left in doubt or confusion.

If the suspicious circumstances in this transaction, hereafter commented on, were fully explained, and if the payment of the purchase-money recited was satisfactorily established, there is not enough in the pleadings and evidence in the present record to justify us in finding that James B. Marshall, at the time he received the conveyance, knew his father executed it with intent to delay, hinder, and defraud his creditors.—*Andrews v. Jones*, 10 Ala. 400; 2 Brick. Dig. 18, § 70; *Anderson v. Hooks*, 9 Ala. 704; *Young v. Dumas*, 39 Ala. 60. But this transaction is marked by many unexplained and suspicious circumstances. The grantee had attained his majority less than a year before the conveyance was executed. There is no explanation attempted, showing how he became the owner of nine bales of cotton in 1861, when he was a minor, and had just returned from the army. His father's answer is not evidence for him. Neither he nor his father is examined as a witness. It is not shown whether his mercantile operations resulted in profit or loss. We suppose there could not have been much profit, as the business seems to have been discontinued after a short experiment. It is not shown how J. B. Marshall became owner of the notes on Gordon, nor whether the maker was solvent or insolvent. But the strangest and most inexplicable feature of the transaction is this: When the deed was delivered, M. A. Marshall, though dealing with his own son, demanded his money with noteworthy haste and emphasis. This betrayed a distrust of his son, and unwillingness to submit to delay. Yet, he parted with title to his land, by deed with covenants of warranty, and, without security of any kind, trusted his son for three-fifths of the purchase-money, to be paid seven or eight months afterwards. Nay, more; he accepted, as evidence of this part of his son's indebtedness, his draft on his commission-merchants, with a promise not to present it for acceptance, until it could be ascertained whether his son would make a good crop. And when it was ascertained that the crop was not good, he received of his son, in payment of \$575 of the \$750, notes on Gorgon for that amount; and offers no evidence that those notes were available, or were ever collected. For the balance, he took his son's note,



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which J. B. Marshall, in his answer, says he has paid, but does not say when. We might note other circumstances, but we consider these enough. They wear the marks of a gift, or simulated sale, rather than a real one; and we hold that the lands conveyed to James B. Marshall are subject to the claim of complainants.—2 Brick. Dig. 23; §§ 122, 123, 124, 125; *Hamilton v. Blackwell*, and *Hubbard v. Allen*, at the present term; *Venable v. U. S. Bank*, 2 Peters, 107; *Cummings & Cooper v. McCullough*, 5 Ala. 324.

The testimony taken before the register, on the first reference, is not noted on the note of the testimony, and we have not considered it.

Conveyances, deemed fraudulent in law, are sometimes made in secret trust for the benefit of the grantor. In such case, the grantee is intended to be the mere holder of the naked title, while the use and benefit are the grantor's. There is a fitness in holding such fraudulent grantee accountable to creditors for all income and profits held by him; for it is the property of the insolvent debtor. This case is not shown to be of that class. We do not doubt that the title and beneficial use were intended to vest in James B. Marshall. The creditors, complainants in this suit, had and have no title to the property, and no such lien as draws to it a right to the possession, or to the income and profits. They have but a mere equitable lien, in the nature of an execution lien at law; and it exists only by virtue of their bill filed. Its extent is, that creditors, thus instituting suit, thereby acquire a right to have the property sold in payment of their demands sued on, paramount to all after-accruing rights and liens.—*Dargan v. Waring*, 11 Ala. 988. Such lien confers no right to rents and profits.—*Bernheim v. Beer*, Sup. Ct. Miss., April term, 1868.

So far as the decree of the chancellor affects Mrs. Gere, and the property claimed by her, it is reversed, and the bill dismissed. Let one-half the costs in the court below be paid by complainants. So far as the decree holds J. B. Marshall accountable for rents and profits, it is reversed and annulled. To the extent it condemns the lands claimed by him to be sold in payment of the demands sued for, it is affirmed. Let half the costs in the court below be paid by James B. Marshall; and in case it can not be made out of him, then let it be paid out of the proceeds of the lands conveyed to him, and hereby ordered to be sold. Let the costs of this appeal, in this court, and in the court below, be paid, three-fourths by appellees, and one-fourth by James B. Marshall and his sureties. Executions to be issued for the above costs, if not paid without.



[Hutton v. Williams.]

## Hutton v. Williams.

### *Bill in Equity by Ward, for Settlement of Guardian's Accounts.*

1. *Probate decree on settlement of guardian's accounts; when binding on ward.*—On the settlement of a guardian's accounts in the Probate Court, made during the minority of the ward, and before the guardian's office has expired, the ward must be represented by a guardian *ad litem*, appointed by the court; otherwise the settlement is voidable, at the election of the infant, seasonably expressed, though the guardian himself can not avoid it, even on error; and neither the appearance of the infant himself in person, nor the appearance of an adult brother on his behalf, and their acquiescence in the account as stated, render the decree valid and binding on him.

2. *Parol evidence, in aid of record.*—When the record of the Probate Court, in the matter of the settlement of a guardian's accounts, fails to show the appointment and appearance of a guardian *ad litem* for the ward, the defect can not be supplied by parol proof.

3. *Burden of proof, as to credits or payments.*—On the settlement of the accounts of a guardian, as of an executor or administrator (Code of 1876, §§ 2516, 2793), the *onus* is on him to prove the correctness of payments or expenditures for which he claims credit.

4. *Rules of practice, on statement of guardian's accounts by register.*—On the settlement of a guardian's accounts in equity, the register should be directed to observe the mode of proceeding on similar settlements in the Probate Court, so far as practicable and consistent with the rules of chancery practice.

5. *Allowance to guardian for board, clothing, &c.; investment in Confederate bonds.*—Where the guardian, instead of lending out or investing the funds of his ward, which were in his hands at the commencement of the war, and hiring out the negroes, retained and used the money for his own benefit, and became himself the hirer of the slaves, he can not be allowed, in extinguishment of the debt thus incurred, to claim credits for board, clothing, and tuition of his ward, at Confederate prices; nor had he any authority to fund such debt in Confederate bonds for his ward.

6. *Medical services to hired slaves.*—In the absence of an agreement to the contrary, the hirer of slaves was bound to furnish medical attendance for them at his own expense; and hence, where a guardian hired his ward's slaves, not being able to contract with himself for exemption from this liability, he can not be allowed a credit for medical services rendered to them by himself as physician.

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| 60 | 133 |
| 66 | 450 |
| 70 | 361 |
| 73 | 412 |
| 80 | 268 |
| 82 | 208 |

APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 22d March, 1873, by Emmett C. Hutton, against David H. Williams, his late guardian, and one Whitfield Walker, as the debtor of said Williams. The chancellor considered and treated it as a bill to surcharge and falsify the settlements of the guardian's accounts in the Probate Court of Greene, hereinafter mentioned; but this court holds that it should be treated as a bill to compel a settlement of the guardian's accounts, regardless of these settlements. The prayer of the bill was

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in these words: "May it please your honor to order and decree that the said settlements and proceedings, had and made by the said Williams, as such guardian, in the said Probate Court, shall be set aside and held for naught, including conversions of solvent credits and funds into Confederate securities; or, if that is not proper, then that the said settlements and proceedings, so far as they are illegal and unauthorized, be set aside, or opened; that the said accounts and settlements may be surcharged, falsified, and corrected, so far as there are any errors or mistakes, and so far as the judge and court were illegal and unconstitutional; also, that said Williams, as such guardian as aforesaid, may be charged with and held to account for all the assets and property of your orator's estate, and for the fair and full value thereof at the time the same were received by him. And may it please your honor, also, to order, decree, and direct that an account may be taken by the register of all the property and assets of your orator's estate which came to his hands, and with which he may and ought to be charged as guardian, and be credited with only such amounts and allowances as he may be legally entitled to against your orator's estate; and also, if there be any balance for distribution in his hands as guardian, that he be required to pay the same into this court, and that the same, when paid, be decreed and distributed according to law." An injunction against Walker, as the debtor of Williams, with other appropriate relief to intercept and subject his indebtedness, was prayed; and the general prayer was added, for other and further relief.

The bill alleged that said Williams was appointed guardian of the complainant, by the Probate Court of said county, on the 2d January, 1854, and duly qualified, gave bond, and entered on the duties of the office, and that he afterwards made the following settlements with said court: an annual settlement on the 13th May, 1856, by which it was ascertained that, on the 1st January, 1856, there was a balance in his hands, due to his ward, of \$496.95; another annual settlement on the 14th July, 1857, when the balance was \$1,517.79, due January 1, 1857; another, on the 13th April, 1858, when the balance was \$3,142.23; another, on the 12th August, 1859, when the balance was \$3,293.28; another, on the 10th January, 1861, when the balance was \$3,110.59; another, on the 6th December, 1862, when the balance was \$3,941.64; another, on the 5th March, 1864, when the balance was \$3,434.78; and a final settlement, on the 5th February, 1866, when he charged himself with only \$1,434.78, as the balance due on his last annual settlement, instead of

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\$3,434.78. The bill alleged, also, that the complainant was not represented by a guardian *ad litem* on any of these settlements, and the same were null and void as to him; that the guardian claimed and was allowed "sundry credits, which were exorbitant, illegal, unjust, and a fraud upon complainant," but which were not specified; that he also failed to charge himself with divers sums which he had received, or ought to have received, and with which he was properly chargeable; that the complainant attained his majority on the 4th May, 1871, and had never in any manner ratified these settlements; also, that the guardian had himself hired the complainant's slaves during the war, and had never accounted for the reasonable value of their hires; that he had wasted the assets of his ward's estate, had converted the funds into worthless Confederate securities, and had charged all his expenditures in Confederate money; that he was a non-resident, and had no property or effects, except a debt due to him from Walker, &c.

Walker answered, admitting an indebtedness to Williams, and specifying property which belonged to him. Williams also answered, denying the charges of fraud and misconduct; denying, also, that he was a non-resident; pleading the final settlement in bar of the relief sought by the bill; alleging that, on a full accounting, the complainant was largely indebted to him; and demurring to the bill for want of equity. He also filed a cross-bill, setting up matters of indebtedness to him on the part of the complainant, asking an account, &c. As to the settlements in the Probate Court, he alleged that they were in all respects legal, regular, and valid, and that the complainant was personally present, attended by an adult brother, at the final settlement on the 5th February, 1866, and acquiesced in its correctness.

The chancellor overruled the demurrer to the bill, though holding its allegations defective as a bill to surcharge and falsify the settlements in the Probate Court; and on final hearing, on pleadings and proof, considering it as a bill to surcharge and falsify, held that the only error shown to have occurred on these settlements was the omission of one year's interest, \$230, which he ordered to be corrected, and allowed as a debit against the account sought by the cross-bill. The complainant appeals from this decree, and here assigns it as error.

WATTS & SONS, for appellant.—1. At the time of the alleged final settlement, in February, 1866, the ward was only about fifteen years old, and no guardian *ad litem* was appointed to represent him on the settlement. The settle-



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ment was simply an accounting by the guardian with himself; and however conclusive it may be on him, it is void as to the ward.—*Hollis v. Caughman*, 22 Ala. 478; *Rhodes v. Turner*, 21 Ala. 210; *Frierson v. Travis*, 39 Ala. 150; *Searcy v. Holmes*, 43 Ala. 608. For the same reason, the annual settlements are also void. The complainant was entitled to a full account and settlement of the guardianship, entirely disregarding these so-called settlements.

2. As to the Confederate transactions involved in the account, the receipts and expenditures in Confederate money, and the alleged investment of \$2,000 in Confederate bonds, the appellant relies on *Lockhart v. Horn*, 17 Wallace, 570; *De Jarnette v. De Jarnette*, 41 Ala. 708; *Houston v. DeLoach*, 43 Ala. 365; *Moody v. Bibb*, 50 Ala. 245; *Newman v. Reed*, 50 Ala. 297; *Corbitt v. Carroll*, 50 Ala. 315.

SNEDECOR & COCKRELL, with W. COLEMAN, *contra*.—The final settlement was in all respects regular, except in the failure to appoint a guardian *ad litem* for the ward; an omission which rendered the decree voidable only, but not void. *Kavanaugh v. Thompson*, 16 Ala. 817; *Jenkins v. Jenkins*, 16 Ala. 693; *Cole v. Connelly*, 16 Ala. 280; *Wyman v. Campbell*, 6 Porter, 240; *Bruce v. Strickland*, 47 Ala. 196; *Frierson v. Travis*, 39 Ala. 150; 22 Ala. 478; 21 Ala. 522. The final settlement not being void, the complainant could only surcharge and falsify it by specifying and proving particular errors and mistakes.—*Cowan v. Jones*, 27 Ala. 325; *Coffin v. McCullough*, 30 Ala. 108; 1 Daniell's Ch. Pl. 424; 2 *Ib.* 765. If the bill be held sufficient for this purpose, it is submitted that no error is shown, except as to the single item allowed by the chancellor.

BRICKELL, C. J.—The question first arising in this case is the effect of the final settlement of the appellee, Williams, as guardian of the appellant, made in the Court of Probate, on the 6th day of February, 1866. If that settlement is valid and operative against the complainant—if the court had jurisdiction of his person, as it certainly had of the subject-matter—the decree rendered thereon is conclusive, until impeached for fraud, or for errors occurring without his fault or neglect. But, if it is not valid against him, as a judicial proceeding—if the court, though having jurisdiction of the subject-matter, was without jurisdiction of his person; and he has not had the opportunity, which the law affords him, to be heard to defend against it—without assailing it for fraud, or for errors which may have intervened, he has the right to demand from the guardian a settlement of

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his accounts, as if that proceeding had not been commenced and ripened into what purports to be a final decree.

An indispensable element of the conclusiveness of a final settlement of a guardian, made during the infancy of the ward, is the representation of the ward by a guardian *ad litem* of the appointment of the court, if the office of the general guardian has not expired. The office having expired, and there being a regular guardian appearing and representing the ward, dispenses with the necessity of appointing a guardian *ad litem*, the record disclosing the appearance and representation. A settlement without the appointment of such guardian, and without affording him the opportunity of appearing and contesting the accounts of the guardian, on behalf of the ward, is *ex parte*, and, at the election of the ward, may be disregarded. It is not evidence against him, and is not a bar to any proceeding he may subsequently commence for a settlement of the guardianship.—*Frierson v. Travis*, 39 Ala. 150; *Wilson v. Wilson*, 18 Ala. 176; *McCree-liss v. Hinkle*, 17 Ala. 459; *King v. Collins*, 21 Ala. 363; *Cunningham v. Pool*, 9 Ala. 615. The statute imposes it as a duty on the Court of Probate, to appoint such guardian (Code of 1876, §§ 2510, 2793); and when the court proceeds without the appointment, and without a legal representation of the infant, as to him, if he elects so to treat it, the settlement is *coram non judice*. The settlement is not, properly speaking, *void*; it is *voidable*, at the election of the infant, seasonably expressed. The guardian, the *actor* in the proceedings, of whom the court has jurisdiction, and who was bound to conduct them regularly, can not, even on error, avoid it.—*Kavanaugh v. Thompson*, 16 Ala. 817; *Treadwell v. Burden*, 8 Ala. 660; *Davis v. Davis*, 6 Ala. 611; *Williamson v. Hill*, 6 Porter, 184. The right to treat the settlement as invalid, belongs alone to the infant, and may be lost by him, if he is not diligent in exercising it.

The bill avers, and the averment is supported by the record of the Court of Probate, which is exhibited, that on the final settlement of the accounts of the guardian, and on the preceding annual settlements, the appellant, then in infancy, was not represented by a guardian *ad litem*. There was in fact, so far as is shown, no representation for him. The answer avers the presence of the appellant, and of an adult brother, at the final settlement, and an examination by them of the accounts and vouchers, and an acquiescence in their correctness. These facts may be true, but they cannot render the settlement valid. The brother was without authority to bind the appellant, and, without the appointment of the court, could not have intervened to contest the accounts



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and vouchers on his behalf. The appellant, an infant, could not, by mere acquiescence, or by direct acknowledgment, in the absence of intentional fraud, affect or impair the right to treat the settlement as void. Nor can the defect in the jurisdiction of the court, which appears of record, be cured or supplied by facts resting in parol.

The settlements not being entitled to the dignity of judicial proceedings—not *res adjudicata*, and not evidence against the appellant—it is not material what are the imperfections of the bill, if its equity depended on the averment of fraud to re-open them, or of errors to surcharge and falsify the accounts. It is, properly, a bill to compel the guardian to an account and settlement, and should have been so regarded by the chancellor.—*Frierson v. Travis*, *supra*.

3. When a guardian, or other trustee, claims a credit for moneys expended, the *onus* of proving the correctness of the credit, devolves on him.—*Pearson v. Darrington*, 32 Ala. 227; *Gantt v. Tucker*, 18 Ala. 27; *Savage v. Benham*, 11 Ala. 49. The statute substantially declares the rule in reference to settlements in the Court of Probate by executors or administrators (Code of 1876, § 2516); and declares that settlements of guardians must be governed by the law applicable to the settlements of executors or administrators.—*Ib.* § 2793. Regarding the bill as dependent for its equity on the averment of fraud to re-open the settlements, or of errors to correct the accounts, the chancellor seems to have treated the settlements and accounts as evidence against the appellant, proving themselves, except so far as he had impeached their correctness by averment and proof. The burden of proof was thus shifted from the guardian to the appellant, and an error committed fatal to the decree. These accounts and settlements were not evidence against the appellant, for any purpose. A reference should have been directed to the register, to take and state an account of the guardianship.

4. In executing the reference, the register should have been directed to observe, as far as practicable, the mode of proceeding on settlements in the Court of Probate. The practice has been, and it is convenient, for the Court of Chancery, when it takes jurisdiction of the settlement of an administration originating in the Court of Probate, to apply the statutes regulating the mode of proceeding in the Court of Probate, as far as is practicable, and is consistent with its own rules of practice. The right of the complainant to an account being clear—the relation of the guardian and ward not being disputed—and no question arising which ought to have been settled by the chancellor, before a reference—the whole case resolving itself into matters of account—an order



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of reference to the register should have been made. The guardian should have been ordered to file, within a specified time, his accounts and vouchers, for a settlement. Notice should have been directed to the complainant, of the filing of the accounts and vouchers; and he should have been ordered, within a limited time, to file objections to them. The register should have been ordered then to proceed, and audit and state the accounts and vouchers, and report the result to the chancellor; the parties being allowed the right of exception to the report of the register, and having notice of the time and place of auditing and stating the accounts, with the right of introducing evidence.

5. In the present state of the record, we do not deem it proper to consider many of the matters of account which may arise on the reference to the register. The guardian seems to claim credit for large expenditures made during the war, in boarding, clothing, and tuition, for the ward. These expenditures were made in Confederate treasury-notes; and the extent to which credits shall be allowed is a matter of controversy between the parties, and we feel bound not to defer its decision. The indication in the present record is, that the guardian did not loan, or otherwise invest the moneys of the ward—that he retained and used them for his own benefit; that he became the principal hirer annually of the ward's slaves, and was the largest, if not the only debtor to the ward. The guardian can not be allowed, in extinguishment of his own debt, to claim credits for these expenditures, at their nominal amount. The value of the board, or clothing, or tuition, not in the uncertain, fluctuating currency of the war, but in the currency of times of peace, is the extent of the credit to which he is entitled. Nor had the guardian authority to fund in Confederate securities the debt due from himself to the ward.

6. The guardian seems to have obtained credit on the settlements in the Court of Probate, for medical services rendered by himself, as a physician, to slaves of the ward he had hired. The law was, in the absence of an agreement to the contrary, the hirer was bound to furnish, at his own expense, the necessary medical attendance to hired slaves.—*Gibson v. Andrews*, 4 Ala. 66. The guardian could not with himself agree to vary this principle of law, and credit for such services should not be allowed him.—*Owen v. Peebles*, 42 Ala. 338.

Without considering any other question, for the errors we have pointed out, the decree must be reversed, and the cause remanded, for further proceedings in conformity to this opinion.

[Nelson v. Stollenwerck.]

**Nelson v. Stollenwerck.***Bill in Equity for Foreclosure of Mortgage.*

1. *Assignment of note by administrator.*—A promissory note, payable to an administrator, assets of his intestate's estate, may be transferred or assigned by him without an order of court; and in the absence of fraud, or collusion between the administrator and the assignee, the transfer cannot be impeached by the beneficiaries of the estate, when the assignee attempts to foreclose a mortgage given to secure the note.

APPEAL from the Chancery Court of Hale.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 18th February, 1874, by Alphonse Stollenwerck, against John Nelson, Jabez C. Nelson, George T. Nelson, and William G. Miller; and sought to foreclose two mortgages, one executed by said George T. Nelson, and the other by said John Nelson and Jabez C. Nelson, and to have the property conveyed sold for the payment of a promissory note, held and claimed by the complainant, which was one of the debts secured by said mortgages. The said promissory note was for \$750; was signed by said John Nelson, Jabez C. Nelson, and George T. Nelson; dated the 8th March, 1873, and payable on or before the 12th December, 1873, to R. B. Waller, as the administrator of the estate of Gideon E. Nelson, deceased, who was the father of said John, Jabez, and George Nelson; and a copy of it was made an exhibit to the bill. The estate of said Gideon E. Nelson was insolvent, and said administrator had sold the lands, under a decree of the Probate Court, for the payment of debts. Said John Nelson became the purchaser of a portion of the lands, but had not paid the purchase-money as required by the terms of the sale; and the administrator had obtained judgments against him and Jabez C. Nelson, who had signed, as surety, one of the notes given for the purchase-money, and had also commenced proceedings to recover the lands, or to enforce his vendor's lien. John and Jabez C. Nelson were cultivating the lands on joint account, and they were largely indebted to Carlisle, Jones & Co., commission-merchants in Mobile, for supplies furnished, and were anxious to procure additional supplies and advances, to enable them to make a crop during the year 1873. This being the condition of the parties, by mutual agreement

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among them, the administrator dismissed his legal proceedings to recover the lands, and the said John and Jabez Nelson executed to him their said note for \$750, as the estimated rent of the lands for the year; and also executed a mortgage on their entire crop to said Carlisle, Jones & Co., to secure the indebtedness to them, the advances made by them during the year, the said note for \$750, and a debt due to William G. Miller and John E. Love; and at the same time, and as part of the same transaction, George T. Nelson, who had become bound as surety for his said brothers on their new liability to Carlisle, Jones & Co., executed to them a mortgage on a tract of land which he owned, as additional security for all of said debts. These are the mortgages which the bill sought to foreclose. The note for \$750 was indorsed in blank by said administrator to A. B. Pittman, and the complainant claimed to be the owner and holder of it by purchase for valuable consideration from Pittman. The bill alleged that, at the time of the execution of said note, the administrator was indebted to said Pittman, "for money advanced by him to pay certain preferred claims, taxes, and expenses of administration, in the aggregate exceeding the amount of said note," and that he transferred the note to said Pittman in part payment of this indebtedness. It is alleged, also, that Carlisle, Jones & Co. had received a portion of the mortgaged crop, and had been paid the entire amount of their debt, and that they refused to execute the trusts of the mortgage for the benefit of the complainant. The prayer was for an account of the complainant's debt, the appointment of a receiver to gather and take charge of the crop, a sale thereof and of the land, or so much as might be necessary to pay the complainant's debt, and for general relief.

A decree *pro confesso* was taken against Carlisle, Jones & Co. Miller & Love answered, asserting their rights under the mortgages, but declaring that they did not wish to see the Nelsons injured by a sale of their property at a sacrifice. The Nelsons jointly demurred to the bill, on the ground that the complainant showed no title to the note, the payment of which he sought to enforce by his bill. The chancellor overruled the demurrer, and they then filed a joint answer, admitting the purchase of the lands at the administrator's sale, and the execution of the note and mortgages, substantially as above stated; alleging that they had not paid their notes to the administrator, because they were the largest creditors of the estate, their claims amounting to about \$110,000, while all the other claims filed against the estate amounted only to about \$27,000; and as to the transfer of



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the note to Pittman, answering as follows: "These respondents know and say, that said Waller, as such administrator, had received moneys belonging to the estate of said Gideon E. Nelson, to a large amount, and certainly exceeding \$8,000, and, to the best of their knowledge, information, and belief, the moneys so received by him were greatly more than sufficient to pay all preferred claims, taxes, and expenses of administration against said estate; and they further say, that they have no knowledge or information as to any such indebtedness of said Waller, as administrator, to said A. B. Pittman, as alleged in said bill, and do not believe there was ever such indebtedness, and so they deny any such indebtedness. And these respondents are advised, and insist, that said Waller had no right, as administrator, to incur any such indebtedness to said Pittman, and if he did incur any such indebtedness to said Pittman, it was his own personal indebtedness, and he had no right to assign or transfer said note to said Pittman therefor."

The cause was submitted for final hearing, on the part of the complainant, on the bill and exhibits, and the deposition of said Pittman; and on the part of the defendants, on their answers alone. In reference to the transfer of the note, said Pittman testified as follows: "I acquired the entire interest in said note by the indorsement of said R. B. Waller in blank, and its delivery by him to me, in consideration of sundry payments which I had made for him, as administrator of said estate, out of my own funds; and I assigned said note to said complainant, A. Stollenwerck, in consideration of goods and merchandise—that is to say, in consideration of my account with him." And in answer to a cross-interrogatory he further testified: "I acquired said note, as before stated, from said administrator. I exhibited to him a statement of what I had paid, with some of which payments he was already familiar. I told him I would take the note on account, if he was willing. He agreed, and indorsed it in blank. The note, when executed, was delivered to me, and I carried it to Mr. Waller; and I acquired it in ten days after its execution. I do not know whether I can state all that I paid for him, but I can state more than twice the amount of said note. I paid \$1,343.17 to Mrs. Laura G. Nelson, in whose favor there was a decree against said Waller. These payments were made to her by me during the year 1871, which I find included in a memorandum of a settlement which I had with her in January, 1872. A part of it was cash which I had paid for her, out of my own funds, in costs of suit; part I paid to her son; and a large part was for fees which she owed me, and took my receipts

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therefor as cash. On 2d September, 1871, I paid Booker & Knight \$436.51, taxes which they had paid out for the estate. I paid this by receipting to them for that amount on an account which they then owed me."

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, for the amount due on the note, and ordered a sale of the mortgaged property by the register, or so much thereof as might be necessary, if the amount was not paid by said defendants within sixty days. The final decree, and the overruling of their demurrer to the bill, are now assigned as error by the Nelsons.

SMITH & ROULHAC, with W. G. JONES, for appellants.—The note is payable to the administrator in his representative character, and shows on its face that it is assets of the intestate's estate; and any purchaser of it is chargeable with notice of that fact, and can acquire no better title than the first assignee had. A purchaser who is chargeable with notice, although he may have acted in good faith, acquires no better title than his vendor had.—*Wilson v. Wall*, 34 Ala. 304-5; *Witter v. Dudley*, 42 Ala. 617; *Johnson v. Thweatt*, 18 Ala. 747. Hence, the material question is, whether Pittman acquired a good title by his purchase from the administrator; and it is insisted that, on the face of the bill, and also on the facts stated by himself in his testimony, the transfer to him was without legal authority. At common law, an administrator had absolute and unqualified power to dispose of the assets which came to his hand,—meaning all kinds of personal property. But this power was subject to great abuse, and its exercise sometimes resulted in the wasting and squandering of the entire estate. To guard against this abuse, and to preserve the rights of the distributees and creditors, the statute has entirely changed the common-law rule, and has deprived the administrator of all power to dispose of the property, except in the manner prescribed by the statute itself—that is, by an order of the proper court.—*Dearman v. Dearman*, 4 Ala. 521; *Bogan v. Camp*, 30 Ala. 276; *Ventress v. Smith*, 10 Peters, 161; *Ikelheimer v. Chapman*, 32 Ala. 686. The statute was intended to remedy a great evil, and is general in its terms. It applies to all kinds of personal property—stocks, bonds, promissory notes, and other *choses in action*. It was not only intended to take away from the administrator a power which was liable to great abuse, but to enable the beneficiaries of the estate to show that there was no necessity for a sale, and to realize the highest market value of the property when sold; and all kinds of personal property are equally within these objects.

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THOS. J. SEAY, with WALLER & PITTMAN, *contra*, cited *Woolfork v. Sullivan*, 23 Ala. 548; *Moses v. Clark*, 42 Ala. 229; *S. C.*, 50 Ala. 326.

MANNING, J.—The bill in this cause was filed by appellee for a decree to sell mortgaged property to pay a promissory note, which the mortgage was made to secure. The note was given by appellants to the administrator of their father's estate, who indorsed it to one Pittman, for moneys advanced by the latter to pay taxes, and other debts of the estate having priority of payment; and Pittman assigned it to appellee. The estate was insolvent, and was under administration as such; and appellants, who were defendants in the Chancery Court, claimed to be its largest creditors. Probably they were so, though no evidence on that subject was introduced; nor was any charge made in their answer, of fraud on the part of the administrator, or of insolvency. The bill was demurred to; and the defense relied on is, that, under the statutes of this State, which require sales of the property belonging to the estates of deceased persons to be made at auction, the administrator had no right to transfer the note in suit to Pittman; and that, therefore, his assignee, the complainant, acquired no title to it.

On the subject of the power of an executor or administrator, this court said, in *Waring v. Lewis* (53 Ala. 630): "He has the full legal title to the *choses in action* of the deceased, and is charged with the duty of collecting them, and reducing them to possession. He may transfer, release, compound, or discharge them, as fully as if he was the absolute owner, subject only to his liability to answer to creditors and distributees, for improvidence in the exercise of his power. No *bona fide* dealing with him can be impeached—no remedy can be pursued against those to whom he may transfer, or whom he may release, or with whom he may compound, or from whom he accepts satisfaction, of the *choses in action*, unless fraud or collusion can be imputed to them." Under this ruling, the defense cannot be sustained.

Let the decree of the chancellor be affirmed.



[Jones v. DeGraffenreid.]

**Jones v. DeGraffenreid.***Bill in Equity to establish and quiet title to Homestead Exemption.*

1. *Homestead exemption; allotment by commissioners, and re-allotment.*—When the defendant claims a homestead in lands on which an execution has been levied by the sheriff, who thereupon appoints commissioners to set apart and appraise the homestead (Rev. Code, §§2880-81), and neither party objects to the allotment made by them; the defendant's title to the homestead so allotted becomes perfect, and it is not necessary that there should be a re-allotment as against *alias* executions.

2. *Same; when equity will remove cloud from title.*—A court of equity will entertain a bill to remove a cloud from the title to a homestead exemption, as against a purchaser at execution sale, when the owner of the homestead is in possession, and can not test his title by an action at law; but this principle has no application, where the purchaser at execution sale has already brought an action at law, and has recovered a judgment in ejectment for the lands claimed.

3. *Same; nature of estate, and in what court asserted.*—When a homestead exemption has been legally claimed and allotted, the title to it is legal, and may be asserted or defended successfully in a court of law; consequently, the owner can not come into equity to assert or protect it, without showing special circumstances for the interposition of equity.

4. *Conclusiveness of judgment in ejectment, and when equity will enjoin action.*—Authorities cited as to the conclusiveness of a judgment in ejectment, as between the same parties, on the same title, in subsequent actions; and as to the extreme cases in which a court of equity will, by injunction, stop further litigation; questions not necessary to be determined in this case. The statute (Code of 1876, § 2969) "at least shows that the right to bring ejectment between the same parties, on the same title, is not limited to one trial."

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APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 29th June, 1874, by E. T. DeGraffenreid, against James Jones; and sought principally to establish and secure the complainant's right to a homestead exemption in certain lands, of which he had possession, against the claim of the defendant as a purchaser at sheriff's sale under execution against him. The complainant was, and alleged that he had been continuously since 1860, a citizen of said county, and the head of a family; and he resided on a tract of land which he had owned, containing about eight hundred and eighty acres, being parts of sections seventeen (17), nineteen (19), twenty (20), and twenty-one (21), in township twenty-three (23), range one, west. In October, 1867, said James Jones recovered a judgment against complainant, in the Circuit Court of said county, for \$9,274, on a

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debt contracted in 1862; and the records having been destroyed by fire in 1868, the judgment was substituted in 1869, and an execution on the substituted judgment was regularly issued, and levied on the said tract of land, with two other executions, which were in the sheriff's hands at the same time. The complainant, defendant in execution, having claimed a homestead exemption in the lands, the sheriff appointed three commissioners to set apart and appraise the homestead; and they made their report in writing, dated February 11, 1870, in which they stated that, "having been duly sworn by the sheriff to divide and lay off said homestead fairly and impartially," they "proceeded to lay off the following lands, as a homestead for said E. T. DeGraffenreid, taking into consideration the improvements thereon: the west half of the north-west quarter, section twenty, and the west half of the south-west quarter, section seventeen, township twenty-three, range one, west." No sale was made under this execution, for want of time, and it was returned for an *alias*. An *alias* execution was issued, which went into the hands of a succeeding sheriff, on the 23d June, 1870, and was by him levied on the following lands: "the south half of section seventeen, the east half of the north-east quarter of section nineteen, and the north half of section twenty," in said township and range; and he made the following return on the execution: "The within lands were sold to James Jones according to law, on the day of sale, for \$1.15 per acre, and terms complied with, October 24, 1870." Another execution was afterwards issued on said judgment, and went into the hands of a succeeding sheriff, by whom it was levied, April 3, 1872, on the following lands: "the west half of the north-west quarter, and the west half of the south-west quarter of section twenty-one," in said township and range; and in his return on the execution he stated, that he had sold the said lands, on the 6th May, 1872, to said James Jones, who became the purchaser at the price of \$33.60, which was not enough to satisfy the costs. While this execution was in the hands of the sheriff, to-wit: on the 20th April, 1872, the defendant made an affidavit before a justice of the peace, and filed it with the sheriff, claiming the lands levied on as his homestead; but the claim was disregarded by the sheriff.

On the 31st May, 1872, said Jones brought a statutory action in the nature of ejectment, to recover the lands which he had bought at the sheriff's sales, which were described in the complaint as "the south half of section seventeen, the east half of the north-east quarter of section nineteen, the north half of section twenty, the west half of the north-west



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quarter, and the west half of the south-west quarter of section twenty-one," in said township and range. At the April term, 1873, a motion was made by the defendant in execution to set aside both of the sheriff's sales; which motion was sustained and granted by the court, at its April term, 1874, as to the last sale, but overruled and refused as to the first, unless said defendant would refund the amount paid by said Jones on his purchase at that sale, which the defendant declined to do. At the same term, the complaint in the action at law was amended, by striking out the lands the sale of which had been set aside; and judgment by default was rendered for the plaintiff in that action, for the lands bought at the first sheriff's sale. A writ of possession was issued on this judgment, under which the sheriff notified the parties in possession of the lands to pay rent to said Jones; and another execution on his first judgment was issued, and levied on the one hundred and sixty acres of land which he had not recovered in his ejectment suit. This was the state of facts existing when the bill was filed.

The bill alleged, as grounds of equitable relief against these proceedings at law, that the first sheriff's sale was not in fact made on the day specified in the advertisement, nor was any public notice of its postponement made on that day; that it was made on a subsequent day, not authorized by law, and without any notice to the complainant, who had no knowledge of it until about one year afterwards; that he notified the sheriff of the homestead which had been allotted to him by the commissioners, and that he again claimed the same as his homestead; that the sheriff disregarded his claim of exemption, and sold the lands in disregard of his rights, and by collusion with the said Jones, who became the purchaser. The bill alleged, also, that the commissioners made a mistake in their allotment of the homestead, inserting the west half of the north-west quarter of section twenty, instead of the east half of the north-east quarter of section nineteen, which was in fact selected by him, and which the commissioners intended to allot to him; and the complainant stated in his bill that he selected this parcel as his homestead, if allowed to do so. The prayer of the bill was, that the court would "order and decree that the homestead which should have been duly allotted by appraisers appointed by said White as sheriff in October, 1870, shall be considered as duly allotted, and by proper decrees be secured for your orator as the head of a family; or, if that be not proper, that the allotment made by said commissioners be carried into effect, and be ratified and confirmed, and by proper decrees secured to your orator as the head of a fami-



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ly; and that, if the mistake be true, it may be so reformed as to speak the truth of what was intended; and that the said allotment, as so reformed, be secured to your orator as the head of a family; and that said defendant be required to pay the damages, special or otherwise, as alleged and proved, including the costs in this cause; and that he be perpetually enjoined from enforcing said writ of possession, until a homestead shall have been duly allotted to your orator, and be required to pay the damages he has sustained, or which may accrue from enforcing said writ of possession; and that he be enjoined from selling and suing for said one hundred and sixty acres of land now advertised to be sold, until a homestead has been duly allotted to your orator; and, if necessary, that proper persons be appointed to allot said homestead, or to make partition between your orator and said defendant;" and the general prayer was added, for other and further relief.

The defendant answered the bill, admitting its allegations so far as consistent with the facts above stated, and denying the other allegations; denying that there was any fraud, collusion, or irregularity, in the sheriff's sale at which he purchased, and alleging that it was in all respects legal, regular, and valid; insisting that the complainant had repudiated and forfeited the allotment of a homestead made by the commissioners, by the inconsistent claim afterwards made by him; denying that the complainant was entitled to the exemption claimed in the bill, but declaring his willingness that a homestead might be allotted to him in section twenty-one, according to his claim and motion in the Circuit Court. He incorporated in his answer a demurrer to the bill for want of equity, because it showed that the right to claim a homestead exemption was forfeited and lost; because the complainant had an adequate remedy at law; because the complainant did not offer to do equity; and because the claim of homestead set up in the bill is not authorized by the laws now in force.

The chancellor overruled the demurrer, and held that the bill contained equity—that it might be regarded "as a bill to remove a cloud from the homestead exemption of the complainant, and, having effected this, to enjoin the defendant from molesting him in the quiet enjoyment of it;" and on final hearing, on pleadings and proof, he rendered a decree for the complainant, declaring that he was entitled to the homestead allotted to him by the commissioners—that no re-allotment was necessary, that the allotment was conclusive on both parties, and was not impaired or in any manner affected by the subsequent sheriff's sale; enjoining the de-

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fendant from molesting the complainant in the quiet enjoyment of his homestead, and remitting the complainant to his action at law for damages. The overruling of the demurrer, and the final decree, are now assigned as error.

W. & J. WEBB, for appellant.—1. The complainant's remedy, if he had any, was at law. If the sheriff sold the homestead, after it had been legally claimed and set apart, without legal notice, and in collusion with the plaintiff in execution, it makes out a clear case of trespass and abuse of process. Hilliard on Torts, ch. 30, §§ 27-33; 6 Ala. 221. Or, the defendant in execution might have had the sale set aside, on motion, in the court from which it issued.—9 Porter, 679; 6 Ala. 221; 39 Ala. 131.

2. His homestead exemption, if he was entitled to any, has been lost and forfeited by his own laches and negligence, and a court of equity will not relieve him.—*Bell v. Davis*, 42 Ala. 460; 30 Ala. 225; 37 Ala. 390; 2 Story's Eq. Jur. 874; 17 Ala. 672.

3. The complainant does not show any right to a homestead exemption in the lands. In 1870, when the land was sold under execution, the Revised Code was the law governing exemptions.—*Miller v. Marx*, at the last term. That law, as contained in sections 2880-81, was repealed by ordinance in 1868, and was not restored by statute until 1877. He can not claim under the law of April, 1873, because it was passed after the sale; and that law repealed all exemption laws then existing. He can not claim under the constitution of 1868, because the judgment was founded on a debt created in 1862.

4. The bill was not filed to remove a cloud from the homestead exemption, or to enjoin the defendant from molesting him in its enjoyment; nor can it be sustained on that ground. *Daniel v. Stewart*, at the last term.

SNEDECOR & COCKRELL, and THOS. J. SEAY, *contra*.—1. The complainant's homestead was claimed and allotted to him in accordance with the provisions of the law existing in 1870, as contained in the Revised Code, §§ 2880-81. The constitution of 1868 applied only to exemptions against debts contracted after its adoption. The ordinance of 1868 was without legislative authority, if not unconstitutional.—*Plowman v. Thornton*, 52 Ala. 569. The repealing clause in the act of 1873 was not intended to take away rights of exemption which had been allowed and perfected, and such a construction can not be given to it—this would be the deprivation of vested rights.



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2. No forfeiture or waiver of this homestead right appears on the face of the bill, and none is brought to light by the evidence. On the contrary, the complainant has been persistent and unremitting in the assertion of his rights; while they have been disregarded and ignored, in spite of his claims and protests, and he is driven into a court of equity, as a last resort, to prevent his actual ejection from the possession. In *Bell v. Davis*, 42 Ala. 460, the homestead was held to have been lost, because the defendant had failed to make any claim whatever; and, even to that extent, the case is a hard one, in depriving the wife and children of a home and shelter, and it ought not to be extended.

3. The jurisdiction of a court of equity, under the facts disclosed by the pleadings and proof, may be maintained on the ground of removing a cloud upon the title.—*Irwin v. Levis*, 50 Miss. 363; *Harrington v. Utterback*, 57 Mo. 519; *Vogler v. Montgomery*, 54 Mo. 577; *Tucker v. Kenniston*, 47 N. H. 267; *Conklin v. Foster*, 57 Illinois, 104; 10 Iowa, 131; Smythe on Homesteads, § 442. The jurisdiction of equity, in a similar case, was upheld in *Andrews v. Melton*, 51 Ala. 400. The complainant is in actual possession of the homestead, and that gives him the right to file the bill. If he had successfully defended the action at law, the purchaser might have brought another action of ejectment; or he might sue out another execution, and again levy on the homestead.

STONE, J.—We agree with the chancellor, that there is nothing in this record which authorizes the reformation of the allotment of homestead, made by the commissioners. They selected and allotted the west half of the south-west quarter of section seventeen, and the west half of the north-west quarter of section twenty, township twenty-three, range one, west; and appellee's claim must be limited to those particular numbers of land. According to the testimony, they embrace the residence of DeGraffenreid, and most of the out-buildings. We think the allotment was sufficiently certain and definite, under sections 2880-81 of the Revised Code; the law which governed the claim at the time the homestead was set off.

We also agree with the chancellor that, this allotment having been made by commissioners duly appointed, when executions were in the hands of sheriff Cole, it was not necessary for DeGraffenreid again to assert his claim, or have a new allotment, when *alias* executions went into the hands of Cole's successor in office. The right to occupy, and to remain in undisturbed possession, was secured to DeGraffenreid by the allotment. No objection or exception



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to that allotment had been filed by any one, so far as we are informed; and it must be regarded as acquiesced in by DeGraffenreid, and by the execution creditors, in part derogation of whose claims the assignment was made.

White, the successor in office of sheriff Cole, levied upon and sold seven hundred and twenty acres of land as the property of DeGraffenreid, including the lands which had been set off as homestead; Jones, the appellant, became the purchaser, and received the deed of the sheriff, conveying the lands to him. Jones brought his statutory action of ejectment against DeGraffenreid for the recovery of the lands, recovered in his suit, and, under a writ of possession, was put in possession of all the lands, except the homestead. This DeGraffenreid continued to occupy, by permission of Jones. The present bill was then filed, the chief object of which was to secure his homestead, and to be quieted in his possession. The bill avers most of the facts above stated, and the others are shown in the pleadings and proofs. No excuse is offered, or attempted to be given, why the action of ejectment was not defended at law.

2. One ground on which the equity of this bill is sought to be maintained is, to remove a cloud from the plaintiff's title; and the following authorities are relied on in support of this view: *Irwin v. Lewis*, 50 Miss. 363; *Vogler v. Montgomery*, 54 Mo. 577; *Harrington v. Utterback*, 57 Mo. 519; *Tucker v. Kenniston*, 47 N. H. 267. We do not gainsay the authority of these cases. But the principle, on which equity intervenes to remove a cloud, or impending cloud, from the title, is, that the party, being in possession, can not bring an action at law to establish his title, or to test its strength; and it is unreasonable that he shall be required to stand in suspense, until it suits the interest or caprice of his adversary to bring suit; his title, in the mean time, resting under distrust, while he is at all times liable to lose the benefit of important evidence, by the death of witnessess.—See *Rea v. Longstreet*, 54 Ala. 291. These reasons do not apply to the present suit, which was begun, not only after his adversary had commenced suit for the recovery of possession, but after that suit had been determined by a recovery of the premises. This bill can not be maintained on this ground.

3. Homestead, when legally and successfully claimed, is a legal seizin, and will maintain or defeat an action of ejectment, as the case may be. The owner of such homestead has a complete and adequate remedy at law; and this, itself, is a full answer to a bill filed for its assertion, unless there be some special, equitable reason shown, why the powers of the Chancery Court should be invoked. None is shown in

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this case. Neither is any reason averred or shown, why the Chancery Court should grant relief, in the nature of a new trial at law.—See 1 Brick. Dig. 666, § 376.

4. The action of ejectment stands on rather peculiar grounds, as to the conclusiveness of judgments rendered therein. As a general rule, many suits may be maintained for the same property, on the same title, and between the same parties; and a recovery in one or more suits will be no bar to a further suit. But this is mainly owing to the fictitious proceedings in which such suits are usually clothed. How far such suits and recoveries are evidence of the facts adjudged, binding on the parties in other litigation, we need not now determine.—See 2 Phil. Ev., Cow. & Hill's and Edw. Notes, 11; 2 Whar. Ev. § 765; Stark. Ev. by Sharswood, 111; *Doe v. Harlow*, 12 Ad. & El. 40; *Doe v. Thomas*, 1 Tyrwh. 410; *Bailey v. Fairplay*, 6 Bin. 450; *Rogers v. Haines*, 3 Greenl. 362; *Richardson v. Stewart*, 2 Serg. & R. 84; *White v. Kyle*, 1 Serg. & R. 515. And in some extreme cases, chancery will interpose by injunction, to put a stop to litigation; but the present case presents none of the features which justify such interposition.—High on Inj. §§ 53, 62, 63; Adams on Ejectment, by Til. 352, and notes; *Calhoun v. Drumming*, 4 Dall. 120; *Cherry v. Robinson*, 1 Yeates, 525; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Leighton v. Leighton*, 1 Pr. Wms. 671; *Earl of Bath v. Sherwin*, 1 Bro. P. C. 266; *Dearden v. Lord Byron*, 8 Price, 417; *Doe v. Huddart*, 2 C. M. & R. 316. See, also, *Pollard v. Baylor*, 6 Munf. 433.

Our statute (Code of 1876, § 2959) has rendered it unnecessary to employ the fictitious proceedings in actions of ejectment, and the suit between these parties was brought under that statute. To what extent, if any, that statute will affect the judgment as an instrument of evidence, the wants of this case do not require us to decide. Section 2969 does limit the number of suits in ejectment that may be brought "between the same parties, in which the same title is put in issue," when the judgments are in favor of the defendant. This, at least, shows that the right to bring the action of ejectment between the same parties, on the same title, is not limited to one trial.

The decree of the chancellor is reversed, and the bill here dismissed, at the cost of appellee, in this court and in the court below.

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### *Bill in Equity for Settlement of Partnership Accounts.*

1. *Statutory provisions as to arbitrations and award.*—Statutory provisions, prescribing the mode of submission to arbitration, and the requisites of an award, are not in abrogation of the common law, unless expressly so declared.

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2. *Submission of "matters in controversy;" what is included.*—Under a general submission of "the matters in controversy" between the parties, without any further description, if the parties appear before the arbitrators, and submit their partnership accounts and transactions, this renders certain and definite the subject-matter of the submission, and the award will be referred to it.

3. *Conclusiveness of award.*—An award, valid on its face, may, like a judgment or decree, be pleaded in bar of a subsequent suit founded on the same claim or demand, and cannot be collaterally impeached: if the plaintiff assails its validity, on account of extrinsic facts, he must amend his bill, and state specifically the facts on which he relies to avoid it.

4. *Execution of submission; ratification of unauthorized signature.*—A person who did not himself sign the submission, but whose name was signed by another jointly with his own, and who appeared before the arbitrators, and entered into the arbitration without objection, thereby ratified the signature, if it was unauthorized, and is bound by the award.

5. *Who must make award.*—Under a submission to two persons named as arbitrators, "they to choose a third man, and their award to be final," an award rendered by the two only, without calling in a third, would be void; but, if the matters submitted relate only to personal property, the terms of the submission may be modified by parol; and if the parties appear before the two arbitrators, and agree to dispense with the selection of a third person, an award may be rendered by the two only.

6. *Certainty and finality of award.*—An award must be certain, and must dispose of all the matters submitted; but, under a general submission of "the matters in controversy" between the parties, an award of a specified sum of money, as due from one to the other, is sufficient on its face; and if the matters actually submitted were certain partnership transactions between the parties, such an award cannot be collaterally impeached, on the ground that it does not decide how the outstanding partnership debts are to be paid, or make any disposition of the partnership property received by one partner in excess of that received by the other, in the absence of appropriate allegations and proof that these matters were brought before the arbitrators.

7. *When award will be set aside, as unconscionable, or oppressive.*—That an award is unconscionable, or oppressive, may be a good ground for setting it aside in equity, at the suit of the losing party, when he is free from all fault or negligence in the matter; but he cannot complain that it works him a wrong or injury, when he failed to adduce before the arbitrators the evidence on which he relies to show such wrong or injury.

8. *When award will be set aside, on account of error in law.*—Errors of law, committed by arbitrators, will not vitiate an award, unless it appears that they intended to be governed by the law, and were mistaken in the application of well established principles.

APPEAL from the Chancery Court of Pickens.

Heard before the Hon. W. A. DILLARD.

The bill in this case was filed on the 21st March, 1871, by John N. Bain, against Raleigh Brewer, and sought an account



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and settlement of certain partnership transactions between them in farming during the year 1870. The lands cultivated by the parties belonged to said Brewer, and were situated in Noxubee county, Mississippi, adjoining Pickens county, Alabama, where the parties lived, and where the contract was made. The first contract was dated January 1, 1869, and was in these words: "We, the undersigned, have this day made the following contract: R. Brewer will furnish the land, rent free, and John N. Bain will work the place free of charge; that is, R. Brewer puts the land against Bain's services, and we go halves in all expenses for the year 1869 and profits," etc.; with particular descriptions of the personal property put in by each, and other stipulations. This contract was signed by both of the parties, and, at the expiration of the year, was renewed for another year. The bill alleged that the partnership had terminated; that the partnership accounts had never been settled; that the defendant had exclusive possession of the partnership property, was largely indebted to the plaintiff, and refused to make a settlement. The defendant answered the bill, admitting the execution of the contract, and the cultivation of the land under it during the years 1869 and 1870, but denying that it created a partnership between him and the plaintiff; and he pleaded, in bar of the relief sought by the bill, that the matters in controversy between them, growing out of the said contract, had been submitted to arbitration, and that the award of the arbitrators was conclusive.

The submission to arbitration, which was dated the 3d January, 1871, was signed by R. Brewer and "J. N. & H. Bain," and was in these words: "We, the undersigned, agree to refer the matters in controversy between us to D. C. Taylor and H. G. Windham, they to choose a third man, and their award to be final." The award of the arbitrators, which was dated the 11th January, 1871, and signed by said Windham and Taylor, was in these words: "We, the undersigned, referees selected by R. Brewer and J. N. and H. Bain to decide and state certain matters between them, have examined the claims and statements of the several parties, and heard all evidence introduced by them. Upon a full hearing of the same, and consideration thereof, [we] agree upon the following statement, which we believe to be just and correct, as near as we could arrive at the same from the evidence and written agreement between the parties, to-wit: amount due R. Brewer to be twelve hundred and eighty-five 61-100 dollars, \$1285.61."

On final hearing, on pleadings and proof, the chancellor held, that the award was uncertain, indefinite, unconscion-

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able, and must have embraced matters which were not included in the submission; particularly a claim by the defendant, for damages to his plantation during the years 1869-70, by the decay of houses and fences, the filling up of ditches, etc. He therefore set aside the award, and ordered a reference to the register as to the matters of account; and on the coming in of the register's report, to which there were numerous exceptions, he rendered a decree requiring the defendant to pay into court the sum of \$3,126.90, as the amount due from him to the complainant. From this decree the defendant now appeals, and here assigns as error—1st, that the court below erred in not dismissing the bill; 2d, in setting aside the award; 3d, in each decree rendered against the appellant; 4th, in overruling his several exceptions to the register's report.

R. H. & R. I. SMITH, and L. M. STONE, for appellant.—

1. "When a bill is filed for a general account, and the defendant sets up a stated account in bar, the plaintiff must amend his bill; because a stated account is, *prima facie*, a bar, till the particular errors in it are assigned. Upon the same ground, it has been held, that an award is a bar to a bill brought for any of the matters intended to be bound by it; and that if a bill is filed to set aside the award, as not being final, the specific objection to it must be stated upon the bill."—1 Daniell's Ch. Pl. & Pr. 371-2. See, also, *Caton v. Willis*, 5 Ired. Eq. 335; *Dawson v. Dawson*, 1 Atk. 1; Story's Eq. Pl. §§ 795, 798, 803; *Vandyke v. Brown*, 4 Halst. N. J. 657, 795; *Mebane v. Mebane*, 1 Ired. Eq. 403; *Badger v. Badger*, 2 Wallace, 87; *Routh v. Peach*, 2 Anst. 519; *Duckworth v. Duckworth*, 35 Ala. 70. This grows out of the undeniable doctrine, that awards, stated accounts, and releases, like judgments, may not be collaterally attacked, but can only be assailed directly by bill in the nature of a bill to impeach or open them; and such bills must specify the errors, mistakes, or frauds on which the attack is based. The bill, in this case, does not attack the award: it does not even notice the award, but ignores it altogether, and proceeds on the idea that there never was any submission or award.

2. But, even if the pleadings had been properly framed to attack the award, no sufficient reason is shown to impeach it. It is the duty of all courts to encourage arbitrations, and awards will not be disturbed, when valid on their face, except for fraud, partiality, or corruption on the part of the arbitrators.—Rev. Code, §§ 3148, 3160-61; *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476; 29 Ala. 325; 8 Ala. 548; 2 Stew. 130. Under a proper construction of the submission, it was not



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necessary that the two arbitrators should select a third, unless they disagreed: the presence of a third man could not have changed the result. The parties themselves put this construction on the submission, and submitted their claims to the decision of the two arbitrators, whom they had themselves selected, without objection; and neither one of them can now be heard to say that the arbitrators had no authority to act.—*Diedrich v. Richey*, 2 Hill, 271; *Caldwell on Arbitration*, 103; 5 Mees. & W. 25; *Jesse v. Carter*, 28 Ala. 475; *Boston Water Power Co. v. Gray*, 6 Metcalf, 331; *Underhill v. Van Courtland*, 2 John. Ch. 339; 1 Atk. 63; 3 Atk. 494; 1 Vesey, 11; 4 Mod. 226; 4 Watts & Ser. 205; *Hawkins v. Colclough*, 1 Burr. 274; 2 Bay, 370; 1 Wash. 14-15; 8 Munf. 8; 7 Cranch, 171; 17 Louisiana, 471; *Davis v. Forshoe*, 34 Ala. 107; *Morse on Arbitration*, 171; 3 Watts, 126; 25 N. H. 381; 10 Pick. 275; *Willingham v. Harrell*, 36 Ala. 583. Nor is the award open to the objection that it is wanting in certainty and definiteness. It merely states, as the result of the arbitrators' calculations and decisions, that a specified sum is due from one party to the other; and this is all that was necessary. They were not required to enter into details, and show how they disposed of each particular item submitted to them.—*Morse on Arbitration*, 408-10; *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476; *Davis v. Forshoe*, 34 Ala. 107; 16 Vermont, 450. If the arbitrators went beyond the submission, and decided matters not embraced in it, as the chancellor supposed, there is nothing in the record to show it; and it is difficult to see how they could have done so, since they had no evidence before them, except the accounts and statements submitted by the parties themselves. Their award cannot be impeached by evidence which was not before them, unless it shows that they were guilty of fraud, corruption, or partiality. Arbitrators are not required to decide according to the strictness of the law, but may abate something in favor of natural equity. Acting in good faith, they may take into account equity and good conscience, and follow their own views of justice; and if the award itself does not show that, intending to follow the law, they missed it, it will not be set aside on account of a mistake of law.—2 Story's Equity, §§ 1453-4; *Knox v. Symond*, 1 Vesey, 369; *Boston P. W. Co. v. Gray*, 6 Metcalf, 131; *Fairchild v. Adams*, 11 Cush. 549; 2 Gallison, 61; 6 Pick. 148; 10 Pick. 348; *Ward v. American Bank*, 7 Metcalf, 486; 6 Humph. 171.

3. An amendment of the bill would be, substantially, a new case; and it ought not to be allowed, unless the court can clearly see that, under such new bill, the award ought to be



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set aside. But, all the evidence adduced being insufficient to impeach the award, even if the bill had been properly framed in the first instance, or should be now amended, it ought to be finally dismissed by this court.

M. L. STANSEL, JOHN T. TERRY, and WATTS & WATTS, *contra*.

1. The submission required the selection of a third arbitrator, and an award rendered by two only is void.—Caldwell on Arbitration, 226; *McCrary v. Harrison*, 36 Ala. 577; *Short v. Pratt*, 6 Mass. 496; *Green v. Miller*, 6 John. 39; Watson on Awards, 73; *Patterson v. Leavitt*, 4 Conn. 50; 2 Greenl. Ev. § 74; Morse on Arbitration, 162, and authorities cited; 7 Wendell, 534. There was no waiver of this fatal defect, even if the presumption of a waiver could arise in such a case. The language and the conduct of the complainant, when the award was announced, as testified to by Taylor himself, show that he was not aware that the arbitrators were proceeding to make an award without calling in a third man; and he himself swears that he did not sign the submission, and never saw it until he then picked it up, and he cannot be held to have waived a compliance with its terms.

2. When an award is unconscionable, or grossly unjust, it will be set aside.—*Chambers v. Crook*, 42 Ala. 171; *Baird v. Crutchfield*, 6 Humph. 171; Caldwell on Arbitration, 170. The award in this case is shocking to the sense of justice; and the testimony of the arbitrators themselves shows that it was rendered without examining any witnesses, or hearing testimony; that they merely took the papers submitted by the parties, added up the result, and struck a balance; and this in a case involving partnership transactions, complicated accounts, claims and counter claims, and damages liquidated and unliquidated. Their finding could only have been based on the claim for damages, set up in the defendant's answer, which was outside of the submission, and outside of the partnership contract.—*Cutting v. Carter*, 29 Vermont, 72; 2 Story's Equity, § 1452 c.; Caldwell on Arbitration, 374, note 1; *Woodworth v. Van Buskirk*, 1 John. Ch. 432; *Emerson v. Udall*, 13 Vermont, 477; *Bean v. Farnam*, 6 Pick. 274.

3. The award is wanting in requisite certainty and finality. While deciding matters outside of the submission, it decides nothing as to the outstanding partnership debts, and nothing as to the large surplus of corn and cotton received by Brewer in excess of his share. These matters were clearly included in the submission, and the failure to decide them renders the award invalid.—*Rider v. Fisher*, 3 Bing. N. C. 874; Caldwell on Arbitration, 242; Adams' Equity, 191-2;

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12 Wendell, 380 ; 11 Wheaton, 446 ; *Chace v. Westmore*, 13 East, 358.

4. The character of the award, as developed by the testimony, is such as to warrant the inference of misconduct on the part of the arbitrators, which render the award void. *Van Cortlandt v. Underhill*, 17 John. 405 ; *Ives v. Metcalfe*, 1 Atk. 64 ; *Bumpass v. Webb*, 4 Porter, 65 ; *Butcher of Croyden's case*, 3 Eng. Ch. R. 76 ; 2 Vernon, 251 ; High on Injunctions, §§ 71, 162 ; Adams' Equity, 193 ; *Hartshorn v. Cottrell*, 1 Green's Ch. 297 ; 1 Sch. & Lef. 204 ; Morse on Arbitration, 535 ; 2 Story's Equity, §§ 1451-54.

BRICKELL, C. J.—The bill was filed by the appellee, for a settlement of the accounts of a partnership in planting, averred to have existed with the appellant in 1870, and to compel the appellant to account for property of the partnership, which, it is averred, he had converted to his own use. The answer denies the material allegations of the bill, and pleads, in bar of the relief sought, that the matters in controversy had been submitted to the arbitrament and award of Hugh G. Windham, and D. C. Taylor, who had rendered their award, ascertaining and declaring that the appellee was indebted to the appellant, on account of such matters, in the sum of twelve hundred and eighty-five 61-100 dollars. The final hearing was on the bill and answer, and proof addressed to the allegations of the bill, the matters of account, and to the fact of the submission and award. The chancellor declared that the award was not a bar, because it was uncertain ; because, in arriving at their conclusions, the arbitrators must have considered matters not submitted to them ; and lastly, because he regarded it as hard, unconscionable, and oppressive on the appellee. A decree was rendered, ordering an account in conformity to the prayer of the bill, and giving special instructions to the register, as to the mode of taking the account. A final decree was rendered, adjudging a large amount to be due the appellee from the appellant ; from which decree this appeal is taken, and numerous errors are assigned.

1. It is obvious that the question meeting us at the threshold of our consideration of the case, is the fact of submission and award ; for, if that fact is proved affirmatively, in the present state of the pleadings, the award is a positive bar to the relief sought by the bill. Parties have an unqualified right to submit all controversies, involving pecuniary demands, or property, and rights of property, to the arbitrament of those in whom they confide, and whom they deem competent to determine them, rather than to enter on litigation.



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tion, by pursuit of remedies in courts established by law. This mode of adjusting controversies, the statute declares, it is the duty of all courts to encourage; and, in this respect, the statute is simply declaratory of the principles which courts of law and equity had observed for a long period prior to its enactment.—*Young v. Leaird*, 30 Ala. 371. The common law recognized the right; and, though statutes may prescribe the mode of submission, and the requisites of an award, they are not, unless so expressly declared, in abrogation of the common law.—*Byrd v. Odem*, 9 Ala. 755.

2-3. The object of the parties, in the submission of a controversy to arbitration, is the ascertainment and determination of their respective rights, and the silencing of litigation; and this object would fail, if the award, when rendered, had not the finality and conclusiveness of a judgment or decree of a court of competent jurisdiction. Such is the effect and operation the law accords to it, when it is within the submission, and determines and disposes of the matters in dispute.—*Morse on Arbitration*, 487. As the claim or demand, which is the subject of suit, is merged in the judgment rendered, the claims or demands submitted to arbitration are merged in the award rendered; and like a judgment or decree, the award may be pleaded in bar of any subsequent suit, founded on such claim or demand.—*Morse on Arbitration*, 490.

The submission before us is very general in its terms. There is no other description of the subject of submission, on which the arbitrators must award, than *the matters in controversy*. To this general term the parties gave a definite application, when they appeared before the arbitrators, submitted their partnership transactions, and litigated their respective demands as partners. The subject-matter of submission was thereby rendered certain; and to that the award must be referred.—*Price v. White*, 27 Mo. 275; *Woodward v. Atwater*, 3 Iowa, 61.

An award can not be assailed collaterally.—*Woodrow v. O'Conner*, 28 Vt. 776. When pleaded in bar to a bill in equity, seeking relief as to matters it embraces, if on its face it is valid, the force and effect of a judgment must be allowed to it. If the complainant assails its validity, for extrinsic facts, the bill must be amended, and these facts must be stated specifically. The principle is the same, as when a release is pleaded; or when, to a bill for general account, a stated, or a settled account is pleaded. Decrees must be founded on, and supported by pleading. Proof, without corresponding pleading, will no more authorize a decree, than pleading without corresponding proof.



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*Caton v. Willis*, 5 Ired. Eq. 335; *McKinley v. Irvine*, 13 Ala. 593; *Paulling v. Lee*, 20 Ala. 753; *Crabb v. Thomas*, 25 Ala. 212. A larger latitude, and less certainty of averment, may have been indulged by a court of equity, than was originally tolerated in courts of law. But, as is said in *Duckworth v. Duckworth*, 35 Ala. 70, "It is a cardinal rule, founded in good sense, that a bill must show the complainant's claim or title to relief, with such accuracy and clearness, and with such certainty, that the defendant may be distinctly informed of the nature of the case which he is called on to meet: matters essential to the complainant's right to relief must appear, not by inference, but by direct and unambiguous averment." The award, if valid on its face, is *prima facie* a bar to this suit, when connected with the evidence that the parties appeared before the arbitrators, and submitted for their determination their partnership transactions, and their liability to each other growing out of their relations as partners—the matters which form the *gravamen* of the bill, and in respect to which relief is sought. Until the bar of the award is removed, of these matters there can be no examination. If the bill assailed the award only, without allegation of the original transactions, and the injury he had suffered from it, the insufficiency of it would be admitted. Claiming relief on the original transaction only, without impeaching the award, which forecloses all inquiry into them, it is equally insufficient. In either instance, but a part of the case is disclosed, and but a part of the facts on which the right of relief depends are put in issue. Hence, the general rule we have stated, that an award can not be collaterally impeached by evidence. The grounds of objection to it must be stated with precision.—*Willingham v. Harrell*, 36 Ala. 583; *Routh v. Peach*, 2 Anst. 519; *Todd v. Barlow*, 2 Johns. Ch. 551; *Evert v. Evert*, 5 Md. 353; 1 Dan. Ch. Pr. 371.

We concede the proposition, urged by the counsel for the appellee, that the defendant, relying on an award as a bar, must show its existence, and its *prima facie* validity; and when offered in evidence, objections addressed to the fact of its existence, or to its invalidity, will be entertained. But, when its existence is shown, objections to its validity must be supported by matter apparent on its face, and not by matter extrinsic, which is not in issue.

4. The only objection, addressed to the existence of the award, is, that it is not shown the appellee entered into the submission. The answer could well be, that the fact is not disputed, either by pleading or evidence. But it clearly appears that he did enter into it. True, the submission appears to have been signed by H. Bain, in the joint names of H. &

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J. N. Bain. The appellee recognized the signature, appeared before the arbitrators in person, and without objection entered into the arbitration. If the signing was without previous authority, he thereby ratified it, and the ratification renders it obligatory.

5. Another objection urged, which does not depend upon extrinsic facts, is that the submission required the arbitrators to select a third person, to act with them in the determination of the controversy, and that failing to make such selection, or, rather, the award not disclosing that such selection was made, and is the award of the arbitrators named and such third person, it is void. This objection would be well taken, and would be fatal to the validity of the award, if it was not shown that the appellee consented to dispense with the selection of such person, and that the arbitrators named should proceed to hear and determine the matters submitted. The matters in dispute were mere pecuniary demands, and claims to personal property, which may be created, extinguished, or released, without writing. The original submission would have been valid, if merely verbal; and subsequent modifications of it by parol were operative. *Valentine v. Valentine*, 2 Barb. Ch. 437.

6. The remaining objection to the award is, that it is wanting in certainty, and does not finally determine the matters in controversy. The want of certainty and finality is supposed to rest in the failure of the arbitrators to declare and decide how the outstanding debts of the partnership were to be paid, or what disposition was to be made of the excess of partnership property Brewer had received. Certainty is essential to the validity of an award; and if, when compared with the submission, the courts cannot ascertain what it decides, it is void.—*Reynolds v. Reynolds*, 15 Ala. 403. Uncertainty, and the want of finality in an award, appear on its face, generally, when the submission, in terms, requires that the arbitrators shall decide several distinct matters, and as to one or more of these the award is silent, or states that no decision is made in reference to them; or, when a submission is general in its terms, and the award recites in detail the matters which are decided, and it is apparent these are but a part of the matters submitted. Under a general submission, like that in the present case, of all demands and controversies, or of “the matters in controversy,” arbitrators are not bound to enter into particulars, and express in their award each matter they have considered. Their duty, it is said, is best discharged, by the simple announcement of the result of their investigation.—*Patton v. Baird*, 7 Ired. Eq. 260. Under such a submission as the present, an award of a cer-



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tain sum of money, as due from the one party to the other, is taken as a full execution of the submission.—*Shirley v. Shattuck*, 4 Cush. 472; *Strong v. Strong*, 9 Cush. 560; *Karthaus v. Ferrer*, 1 Peters, 222. That result cannot be reached properly, unless all the claims and demands the parties may have against each other are considered.

Again, this objection involves extrinsic facts not put in issue. Neither by the submission, nor by the award, does it appear that there were outstanding debts against the partnership, or that Brewer had received of the partnership property more than Bain had received. These facts are disclosed only by the evidence. The award, on its face, is valid, and is a bar, not being impeached by appropriate allegations in the bill. No case could, more fully than this case, illustrate the importance and necessity of the rule which requires a plaintiff, impeaching an award, to state specifically the grounds of impeachment. The defendant had the right to be informed what were the objections relied on to defeat the award, and to reopen the controversy it was intended to close. Without informing him, the plaintiff introduces evidence of the partnership transactions, of debts created in the course of the partnership business, and of the shares of the partnership property each partner had received; and relies on the inferences which may be drawn from this evidence, and the results to which it leads, as indicating clearly that the arbitrators must have been guilty of partiality, or have fallen into gross error. But he neither avers nor proves that the arbitrators had before them the evidence now introduced. If he failed to introduce this evidence before the arbitrators, it was his own laches, and he forfeited all claim to rely on it subsequently, without excusing his neglect.—*Stiff v. Washington*, 5 Blackf. 473. If the award had been directly assailed, because the arbitrators, disregarding this evidence, had fallen into a gross error which vitiates it, the defendant would have been informed of the necessity of showing by proof that such evidence was not before them. The conjectures which have been indulged, as to what were the grounds on which the arbitrators proceeded, it may be, could have been dispelled; conjectures indulged, we may remark, in violation of the old and established principle, that presumptions are made to support, not to defeat an award. We hold the award *prima facie* valid, and a bar to the case as it stands on the present pleadings.

The validity of the award, however, seems to have been a principal point of litigation in the court below; and it is certain the appellee has given all the evidence he can introduce, to avoid it. It would not be decisive of the litigation,



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to reverse the decree, merely because of the insufficiency of the pleading. If, on appropriate pleading, the facts would not warrant setting the award aside, and entering into an account of the partnership transactions, it is better that we should pronounce the decree the chancellor ought to have rendered, and not by a remandment of the cause protract litigation.

7. The decree of the chancellor proceeds, mainly, on the ground that the award is unconscionable, and oppressive to the appellee. This may be good cause for setting aside an award; but it can be only when it clearly appears that the party complaining is free from fault or neglect; that having fairly and fully submitted the merits of his controversy, the arbitrators have wrought him injustice, either from partiality to his adversary, or from fraud and corruption; or that they have fallen into gross error, indicative of partiality, or of misconduct. It may be apparent that error has been committed—that the judgment of a court of competent jurisdiction would have been different, and that the losing party suffers injury. If the matter has been fairly tried by the arbitrators whom the parties have selected, it must be supposed that the possibility of falling into error was fully considered, and the risk of it consented to, when they were selected. The oppressiveness of the award is deduced from the fact, that the result reached by the arbitrators is so variant from that which is shown by the evidence to be the result on a fair and full statement of the partnership accounts. It cannot be said the arbitrators were guilty of error, or that partiality, or fraud, or corruption, can be imputed to them, however variant may be the award from this result, unless it had been shown they had such evidence before them. As well could the verdict of a jury be impeached, because of facts not in evidence, which would have compelled a different verdict. What evidence was before the arbitrators, is not shown, beyond their testimony, confirmatory of the recitals of the award, that the parties appeared, presented their accounts, and made their statements. No witnesses were examined, because none were offered, nor was it claimed by either party that any were desired. To impute to arbitrators gross error, nearly allied to, and indicative of corruption, because, in active litigation, by evidence not brought before them, it may be shown that the award they have rendered works a wrong to the losing party, would be sheer injustice. Indeed, who can say they have erred? Who can say the evidence they had did not justify their conclusions? A party entering into an arbitration must exercise the same diligence in presenting his

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claims, or defense, that he is required to exercise in suits at law or in equity. Laches is as fatal to relief against an award, as it is to relief against a judgment. All the evidence found in this record could have been brought under the consideration of the arbitrators; and if the appellee neglected its introduction, he must bear the consequences. Whatever of injustice it may disclose the award works, is not attributable to the arbitrators, nor to his adversary.—*Stiff v. Washington, supra.*

8. It is also urged by the chancellor, that the arbitrators must have taken into consideration the unfounded claim of the appellant, for waste to his plantation, committed or suffered by the appellee. If the claim was submitted to them—if it was a matter in controversy between the parties—its allowance, or disallowance, rested in their decision. It may be, if allowed to the appellant, an error of law was committed. But errors of law, committed by arbitrators, will not vitiate an award, unless it appears they intended to be governed by the law, and have mistaken well established principles applicable to the facts before them.—*Pierce v. Perkins*, 2 Dev. Eq. 250; *Johnson v. Noble*, 13 N. H. 286. While the error, which it is supposed the arbitrators committed in this respect, would not avoid the award, the supposition that it has been committed is mere speculation.

The uncertainty of the award, and its want of finality, when construed in the light of the evidence, were also supposed to be fatal to it. This objection we have considered. The existence of partnership debts, or, if any existed, the liability of Brewer for them, was one of the matters in controversy, embraced in the submission. It had been the subject of unpleasant disputation for several months before the submission, and before the termination of the partnership. It is not possible to avoid the conclusion, that they were considered by the arbitrators, and, so far as they are now shown, disallowed, or materially reduced. They were, doubtless, of the accounts the appellee submitted, and which he claimed should be allowed to him. This is also true of the claim that Brewer had received a larger share of the partnership corn and cotton than he was entitled to receive. These matters must have been considered, before the arbitrators could have reached the conclusion, that there was a debt due from the appellee to the appellant. Such debt could not exist, until there had been an examination of the partnership accounts, the liability of each partner was ascertained, and the claims against the partnership to which each was entitled, and then it was ascertained what was due from the one partner to the other. All this the award imports as

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having been done, and it is a final, conclusive settlement of the partnership transactions of these parties, certain and definite in its terms.

Every consideration of policy, which attaches conclusiveness to judgments, applies with equal force to awards. It is as essential to the peace of society, and to the security of individuals, that, when free from fraud, corruption, or partiality—when fairly made, and when they are definite and certain in their results—that their conclusiveness and inviolability should be maintained, as that judgments should not be disturbed, or the litigation they involved be reopened. The award not being subject to any of the objections made to it, if these objections were well pleaded, it must prevail, as a bar to the suit.

The result is, the decree must be reversed, and a decree here rendered dismissing the bill, at the costs of the appellee.

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### *Creditor's Bill in Equity against Fraudulent Grantee.*

1. *When creditor without lien may come into equity.*—The statute which authorizes a creditor by simple contract only, without a lien, to come into equity to reach and subject property fraudulently conveyed by his debtor (Code of 1876, § 3886), applies only to property situated here, and has no extra-territorial operation.

2. *Same; jurisdiction of equity as to foreign lands.*—A foreign creditor by simple contract, having no lien, can not maintain a bill in equity here, against the voluntary grantees of his deceased foreign debtor, to make them account for foreign lands fraudulently conveyed by the debtor in his life-time. The power of a court of equity to compel the performance of its decrees in *personam*, although the lands involved in the litigation may not be within its jurisdiction, do not extend to such a case.

3. *Liability of lands for debts, at common law, and by foreign statute.*—By the old common law of England, lands could not be subjected by legal process to the payment of simple debts; and the courts of Alabama can not judicially know how far this principle has been changed by statute in Mississippi.

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### APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 26th June, 1871, by John Parker, since deceased, and revived in the name of his executor on his death pending the suit, against Mrs. Laura A. M. Lide and her husband, Mrs. Addie B. White and her husband, and Mrs. Julia A. Thomas and her husband. Mrs. Thomas and her husband resided in Lauderdale county, Mis-



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Mississippi; and Mrs. Thomas, before her last marriage, was the widow of Isaac S. O. G. Greer, deceased, who had lived and died in said county of Lauderdale. Mrs. Lide and Mrs. White were the children of Jere H. Brown, deceased, who lived and died in Sumter county, Alabama, where also they and their husbands resided. Prior to 1861, but at what precise time does not appear, said Isaac Greer became indebted to said John Parker, the complainant in this suit, for borrowed money; and on the 1st March, 1863, in renewal and extension of this indebtedness, he executed to said Parker his promissory note for \$9,223.12, payable twelve months after date. On this note a partial payment of \$500 was made on the 22d March, 1866, and another on the 24th April, 1867, of \$300; and the balance was alleged to be due and unpaid when the bill in this case was filed. On the 1st September, 1866, said Greer also borrowed a large sum of money from said Jere H. Brown, to whom he executed his two promissory notes, one for \$5,000, and the other for \$10,000, payable respectively six and twelve months after date; and to secure the payment of said notes, he executed a deed of trust to J. C. Bogle as trustee, conveying a large tract of land in Lauderdale county, Mississippi, with other property, real and personal, authorizing said trustee to advertise and sell the property, if the two notes were not paid by the 1st March, 1869, and to appropriate the proceeds to the payment of the entire amount then due, principal and interest. The bill alleged that this debt was contracted in Alabama, and that the notes and deed were also executed here, though the property conveyed was in Mississippi. These notes, and the deed of trust, were afterwards transferred by said Brown, by voluntary assignment, as a gift, to his two daughters, Mrs. Lide and Mrs. White; and default being made in the payment of the notes, they united with the trustee in filing a bill in equity to foreclose the deed of trust. The bill was filed on the 29th day of July, 1869, in the Circuit Court of Lauderdale county, Mississippi, sitting as a court of equity; and the widow and children of said Greer were made defendants, together with his administrator, John McInnis. In his answer to said bill, the administrator claimed that the notes were entitled to a credit of \$6,377.25; and the credit, or an abatement of the amount due on the notes, was allowed. A reference to the master having been ordered, he reported the amount due on the notes, on the 1st February, 1870, at \$8,975; and his report was confirmed by the court. A sale of the lands having been ordered by the court, Mrs. Lide and Mrs. White became the purchasers, for the amount of the decree in their favor, less the amount brought by the sale of the other prop-

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erty, which was paid to them by said trustee; and the sale was regularly reported and confirmed, and titles made to the purchasers under the order of the court.

The bill in this case alleged that, at the time of this transaction between Greer and Brown, Greer was largely indebted to other creditors besides complainant, and his embarrassment was well known to Brown; that the deed of trust to Bogle conveyed substantially all his property, which was worth much more than the amount of the secured debt; that the sum borrowed from Brown by Greer was only \$8,622.95, and the fictitious sum of \$15,000 was purposely inserted, in order to protect Greer's property from the claims of other creditors; and that the transaction was intended to hinder, delay, and defraud the other creditors of Greer. The prayer of the bill was, that the said deed of trust might be declared fraudulent and void as against the complainant; that the purchase by Mrs. Lide and Mrs. White, and their title derived under the deed of trust, might also be declared void, or held to enure to the benefit of the complainant; that they might also be made to account for all moneys which they had received under the deed of trust, and for the rents and profits of the lands while in their possession; "that the said lands be subjected to, and sold for complainant's debt on Greer;" and the general prayer was added, for other and further relief. The widow of said Greer was made a defendant to the bill on account of her dower interest in the lands, which was controverted in the Mississippi suit, and settled by compromise between the parties.

A decree *pro confesso* was entered against Mrs. Thomas and her husband. The other defendants filed a joint demurrer to the bill, for want of equity, because the complainant had not exhausted his legal remedies, and because the lands in Mississippi were beyond the jurisdiction of the court. The chancellor overruled the demurrer, holding that the bill presented a case for equitable relief, and that if the transaction between Greer and Brown should, on the proof, be found fraudulent as against Greer's creditors, the court might, by a personal decree against the defendants, compel them to account for the lands in Mississippi; and on final hearing, on pleadings and proof, deciding that the transaction was fraudulent, he rendered a decree for the complainant, in accordance with the prayer of the bill. The decree on the demurrer, and the final decree, are now assigned as error. It is unnecessary to notice the matters of defense set up in the answers, or the evidence adduced by the parties as to the *bona fides* and validity of the deed of trust.



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W. G. LITTLE, and THOS. B. WETMORE, for appellant.—As a proceeding *in rem*, the bill can not be maintained, because the lands lie beyond the jurisdiction of the court. The complainant's remedy against the lands can only be pursued in the courts of Mississippi.—Story's Conflict of Laws, §§ 551, 555. The court in Mississippi had jurisdiction of the lands, and all the proper parties were before the court. Its proceedings were regular, and they can not be impeached, or annulled, as this bill attempts to do. As a bill to reach and subject property fraudulently conveyed by a debtor, under the Alabama statute (Code of 1876, § 3886), the bill is wanting in equity: in the first place, because the property is beyond the jurisdiction of the court, and the statute can have no extra-territorial operation; and in the second place, because a deficiency of legal assets is neither proved nor averred.—20 Ala. 662, 817; 30 Ala. 478; 31 Ala. 172; 51 Ala. 544. As a proceeding *in personam*, the suit can not be sustained, because a personal decree or judgment can not be rendered against married women.—1 Daniel's Ch. Pr. 146, 3d Perkins' edition; *Ravisies v. Stoddart*, 32 Ala. 600; *Cowles v. Marks*, 53 Ala. 499.

A. W. COCKRELL, *contra*.—As to jurisdiction of the court, see the cases collected in Robinson's Practice, vol. 1, p. 336, top; also, *Halfman v. Ellison*, 51 Ala. 543.

MANNING, J.—The bill in this cause was filed by Parker, a creditor of the late Isaac O. G. Greer, against appellants, Mrs. Lide and Mrs. White, and their husbands, of Sumter county, Alabama. The wives became purchasers of the lands in controversy, situated in Mississippi, at a sale made by order of a Chancery Court in that State, under a trust-deed executed by Greer, as security, to their father, Jere H. Brown, late of Sumter county, Alabama, deceased, for money borrowed by Greer of him; which debt and trust-deed he gave to them, his daughters. The lands were bought with the debt; and it is not alleged that they were bid off at less than their value at that time, or that Mrs. Lide and Mrs. White received upon the debt, in property and money, more than was actually due, for the principal and interest of the amount lent by Brown to Greer.

It is not necessary for us to inquire into the intent—alleged on one side, and denied on the other, to have been fraudulent—with which the transaction between Greer and Brown was entered into by them. Whether the fact that Greer's promissory notes to Brown, and trust-deed to Bogle to secure payment of them, were made for a larger amount



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than the sum Greer actually obtained from Brown and interest thereon, was the result of a scheme of one of them, concurred in by the other, to protect Greer's property from other creditors, or was due only to the failure to get in from debtors of Brown some of the money he agreed to lend to Greer, and which the latter therefore did not obtain, is unimportant, in the view we take of this case.

It is clear that the property, which this trust-deed embraced, consisting chiefly of lands, was situated in Lauderdale county, in the State of Mississippi; and that Greer resided in that county, and died there; and that the administration of his estate was there lawfully granted to one John McInnis. Though there are allegations in the bill that Greer was indebted to complainant, Parker, and other creditors, and was much embarrassed at the time when the trust-deed was made, and that it contained substantially all of his property; it is not averred that his estate was insolvent at the time of, or after his death; nor that complainant had brought suit at law against him, or his administrator, for the debt due from him, and had prosecuted it to judgment, or had even presented the note to the administrator as a claim against Greer's estate. Nor is any administrator of Greer made a party to this suit. It is hence apparent, that Parker, who was a creditor by simple contract only, and without any lien, had not put himself in a condition to set up any sort of a claim to the aid of a court of equity to enforce the payment of the debt to him, unless he was entitled to it by virtue of some statute.—*Sanders v. Watson*, 14 Ala. 200; *Halfmann's Executors v. Ellison*, 51 Ala. 544; 1 Brickell's Dig. 655.

The only statute that can be supposed to aid the complainant, is contained in section 3886 (3446) of the Code of 1876: "A creditor without a lien may file a bill in chancery, to subject to the payment of his debt any *property* which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor." But, evidently, the *property* here referred to is property within the State of Alabama. It cannot be presumed that the legislature meant to give to its enactment, if it could do so, an extra-territorial operation, or to authorize courts of equity here, through their power over parties within their jurisdiction, to appropriate real and personal property situated in another State, to the payment of simple-contracts creditors in Alabama or elsewhere.

By the old common law of England, lands were not subject at all to be sold to pay simple-contract debts. Every State is entitled to have such a policy of partial or total exemptions, in matters of this sort, as it may choose to establish;

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and that policy, whatever it may be (and that of Mississippi cannot be judicially known by the courts of another State, and is not shown by allegations in this cause), can no more be interfered with, or administered through decrees, *agere in personam*, of alien courts, that it can be prescribed by an alien legislature. It is a misapplication of the doctrine of the case of *Penn v. Lord Baltimore* (1 Vesey, 444), and of other cases relating to the specific performance of contracts concerning lands not within the jurisdiction of the court decreeing it, and of cases in which the plaintiff has been defrauded out of his *title* to lands so situated by the defendant in a cause, for a court in Alabama, at the instance of a mere creditor who never had any title to, or lien upon the land, once belonging to his debtor in another jurisdiction, nor ever instituted any proceedings there against it, to undertake to subject to the payment of the debt to this creditor such real estate within the dominion of another sovereign, by a decree in any form whatever.

It follows, that the decree of the chancellor must be reversed, and the bill be here dismissed; and the appellee must pay the costs in this court, and in the Chancery Court.

## Tindal et. al v. Drake et al.

*Bill in Equity for Partition of Lands, Account of Rents and Profits, &c.*

1 *Private legislative act, appointing trustee to execute trust created by deed, in which infants are beneficiaries.*—A private statute, appointing a trustee to execute a trust created by deed, in which infants are interested as beneficiaries, and authorizing him to settle with the acting trustee and to execute all the powers conferred by the deed on the original trustee (enacted at the instance of the acting trustee and most of the adult beneficiaries), is not an invasion of judicial power by the legislature, but a legitimate exercise of their own appropriate functions; and its validity is not affected by the fact that, at the time of its enactment, the acting trustee had filed his accounts for settlement in the court by which he was appointed, and asked to be discharged, and proceedings under his petition were still pending.

APPEAL from the Chancery Court of Hale.

Heard before the Hon. A. W. DILLARD.

The original bill in this case was filed on the 26th April, 1871, by Pleasant M. Tindal (or Tindel) and others, children and grandchildren of Harvey Tindal and Sarah E., his wife, against William B. Drake and others; and sought, principally, a partition of certain lands, which the complainants



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claimed, and which were in the possession of said Drake, and an account of the rents and profits while in his possession. The several deeds under which the complainants claimed an interest in the lands, and which were made exhibits to their bill, are set out in the opinion of the court, and require no fuller description. The said W. B. Drake acquired possession of the lands, and claimed title to them, under a purchase and conveyance, made in February 1863, from Mrs. Sarah E. Tindal and James M. Tindal; the latter assuming to act as trustee for Mrs. Sarah E. Tindal and her children under the several deeds, and deriving his power to so act from a private act of the legislature, approved February 9, 1860, by which he was appointed trustee, and authorized to execute the trusts created by the said deeds. This act, which is copied in the opinion of the court, may be found in the Session Acts of 1859-60, p. 670. James May, the trustee named in the deeds, having died, Harvey Tindal was, in June, 1850, appointed trustee in his stead, by the Chancery Court of Greene County, in which county the lands were situated, and all the parties then resided; and said Harvey Tindal having died, Philip P. May was, in June 1854, appointed trustee in his stead by the same court. Philip P. May was made a defendant to the bill; which alleged, that he had never resigned, nor been removed from the trust; and prayed that, "if necessary," he might be removed, and a new trustee be appointed in his stead, because he refused to assert his legal rights as trustee.

There was a demurrer to the bill on various grounds, which was sustained by the chancellor; but his decree was reversed by this court on appeal, at its June term, 1874, and the cause was remanded.—See *Tindal v. Drake*, 51 Ala. 574-79. After the remandment of the cause, the bill was amended, bringing in several new parties, in accordance with the decision of this court; and a bill of revivor and supplement was also filed, bringing in the personal representative and heirs of W. B. Drake, who had died, as parties. An answer was filed by Drake's administrator, setting up the special act of the legislature appointing James M. Tindal as trustee, and the sale and conveyance by said trustee to Drake; alleging that the said act was passed at the instance of Philip P. May, the acting trustee, and of Mrs. Tindal and her adult children; and that the sale and conveyance to Drake was made in accordance with the requirements of the several trust deeds, and was valid. The validity of this act of the legislature, and the consequent validity of the sale and conveyance to Drake, were the main questions presented on the second hearing of the cause. On the part of the complainants, a



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transcript from the records of the Chancery Court of Greene was offered in evidence, showing the appointment of Philip P. May as trustee, and the proceedings had on his bill or petition for a settlement of his accounts and discharge from the trust. This transcript showed that said May's bill, or petition, asking a settlement of his accounts and discharge as trustee, was filed on the 2d September, 1857; that a decretal order was made at the June term, 1858, ordering the register to state the accounts of the trustee, and to report a suitable person to be appointed in his stead; that at the ensuing February term, 1859, the register made his report, showing that, on the statement of the trustee's accounts, the trust estate was indebted to him in the sum of \$33.60, but failed to recommend any one as a suitable person to be appointed in his stead; that the reference as to the appointment of a new trustee was continued to the next term, and again to the next term, the chancellor refusing to recognize the appointment of James M. Tindal under the act of the legislature, and the register reporting that he was unable to find a suitable person who would accept the trust. These proceedings were had before Hon. JAMES B. CLARK, as chancellor, who delivered the following opinion: "The legislature having passed an act, appointing James M. Tindal as trustee for the defendants under the deeds mentioned in the bill, and directing the plaintiff to deliver over the property in his hands and account and settle with said James M. Tindal, and then be discharged and released from the trusteeship, I was disposed to acquiesce, and to allow this cause to be dropped from the docket, on the payment of the costs; but, on reflection, I am satisfied that such course would be improper. Minors are concerned in the case, as *cestuis que trust*. The said James M. Tindal, whom the register has heretofore refused to recommend as a suitable trustee, is to take possession of this property, without giving any security for the protection of these minors, whom the law regards as under my protection. I consider the action of the legislature as wholly unauthorized, and I might say unprecedented. If this court has jurisdiction—of which, I presume, there can be no doubt—then the legislature had none; and I shall therefore disregard their action. The cause must remain on the docket." At the December term, 1860, he ordered the cause to be discontinued from the docket, at the costs of the trustee, and refused to discharge him from the trust.

On final hearing, on pleadings and proof, the chancellor held that the act of the legislature was valid, and that the title to the property passed to Drake by the sale and conveyance of James M. Tindal and Mrs. Sarah E. Tindal. He

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therefore rendered a decree dismissing the bill, and his decree is now assigned as error.

JAS. E. WEBB, for the appellants.—The act of the legislature is a palpable usurpation of judicial power, which renders it void. Each department of the government is expressly forbidden, by the constitution, to exercise “any power properly belonging” to either of the others. The management, control, and settlement of trust estates, and the appointment and removal of trustees, properly belong and appertain to courts of equity.—Perry on Trusts, 271, §§ 293-4, citing *Wilson v. Towles*, 36 N. H. 129-38; 2 Daniel’s Ch. 1446; 2 Story’s Equity, §§ 976, 1059; Adams’ Equity, 38-9; *Gaines v. Harvin*, 19 Ala. 491. The legal title to the lands was in P. P. May, as trustee, by the decree of the court appointing him; and to divest that title out of him, and invest it in another, is a purely judicial act. While it will be found difficult to classify objectionable laws, says Mr. Sedgwick, “they will be found generally to range under three heads: 1st, when the legislature has, by a special act, sought to dispense with a general law, in favor of an individual; 2d, where the act is one of legislation, for a particular case; 3d, where the act is in its nature judicial.”—Sedgwick’s Const. Law, 167. This act is obnoxious to two of these rules: it is legislation for a particular case, and it is an attempt to exercise judicial power. An act granting a new trial, and an act granting a divorce, have been declared void, as being the exercise of judicial power. *Sanders v. Cabiness*, 43 Ala. 178; *Weaver v. Lapsley*, 43 Ala. 230; *Cram v. McGinnis*, 1 Gill & J. (Md.) 463; *State v. Fry*, 4 Mo. 120. Such power can not be both legislative and judicial, because, as Mr. Cooley says (pp. 90-91), “a wonted difference exists between the employment of judicial and legislative tribunals,” and when an act or power is shown to be judicial, it necessarily results that it can not be legislative.—Dwarris on Statutes, 492; *Greenough v. Greenough*, 11 Penn. 494; 19 Illinois, 382; 5 Yerger, 320; Smith’s Com. 513. In *Tiffany and Bullard on Trusts*, there is a statement, unsupported by authority, that a trustee may be appointed by an act of the legislature; but the statement seems to limit the principle to cases of necessity. In this case, there was no necessity, and even no vacancy in the office. The trustee derived his appointment from the court, and could only be discharged by the court. Proceedings were pending in the court, on his application, to obtain a settlement and discharge; and while these proceedings were still pending and undetermined, the legislature attempts to interfere by a private act—to remove one trustee,



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and appoint another ; to create a vacancy, and fill it by legislative appointment.—*Pittman v. Adams*, 44 Mo. 585-9 ; *State v. Brice*, 7 Ohio, 414 ; 2 Conn. 532 ; *Kennedy v. Turnley*, 6 Irish Eq. 402 ; 1 Beavan, 473 ; 7 Vesey, 486 ; 7 Hare, 107 ; *Powers v. Bergen*, 6 N. Y. 358 ; *Garnett v. Leonard*, 47 Mo. 207.

A. BENNERS, THOS. J. SEAY, and A. A. COLEMAN, *contra*.—There is no allegation or pretense of fraud, in the sale and conveyance to Drake. The sale was considered judicious, proper, and necessary, when it was made ; the consideration was reasonable, and the adult beneficiaries consented to and approved it. The case is narrowed down to the single question, whether the act of the legislature was valid, and authorized the sale ; and this question can only be raised by the infant complainants, since the adults who procured the passage of the act of the legislature, or assisted in procuring it, can not be heard to question its constitutionality.—Sedgwick on Statutes, 88, and note ; *Ferguson v. Landrum*, 5 Bush, Ky. In passing on the constitutionality of a statute, the courts require that its nullity and invalidity shall be clearly shown, and the particular provision pointed out which is supposed to be violated.—Cases cited in 20 U. S. Digest, p. 188. It must be remembered, too, that the law-making power of the legislature is supreme within its sphere, subject only to the limitations imposed by the constitution ; and the court must look, not to what the constitution authorizes, but to what it prohibits.—*Philadelphia v. Field*, 58 Penn. 320 ; 13 Cal. 159 ; 6 Clark, Iowa, 391. The specific objection to this statute is, that it is an attempt by the legislature to exercise and usurp judicial powers ; and the argument is, that since the courts may with propriety appoint and remove trustees, therefore the legislature can not. But this conclusion is a *non sequitur*. There are many powers which may properly—that is, with propriety—be exercised by the legislature, or given by statute to the courts ; as in establishing rules of practice, or rules of proceeding. The word “properly,” as used in the constitutional prohibition, must be construed to mean strictly, or exclusively, not merely appropriately : that no one department of the government shall exercise any power strictly (or exclusively) belonging to either of the others. The appointment of a trustee is not strictly a judicial act : it does not involve the idea of a trial, the ascertainment of contested liabilities, the passing of a sentence or judgment, or deciding upon a law already enacted. This question had been decided by this court, in the case of *Gaines v. Harvin*, 19 Ala. 499, before the appointment of the trustee in this case was made ; the decision being expressly based on the



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ground that the appointment of a trustee, though quasi-judicial, is not a strictly judicial act. The power of the legislature to appoint trustees is fully vindicated, on principle and authority, in the following text-books and adjudged cases: *Tiffany & Bullard on Trustees*, 350, 473; *Cooley's Const. Lim.* 97-106; *Hindman v. Piper*, 50 Mo. 293; *Rice v. Parkman*, 16 Mass. 326; *Cochran v. Van Surlay*, 20 Wend. 373; *Thurston v. Thurston*, 6 R. I. 296; *Williamson v. Williamson*, 3 S. & M. 715; *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Powers*, 30 Miss. 246; *Estep v. Hutchman*, 14 S. & R. 435; *Carroll v. Olmsted*, 16 Ohio, 251; *Stanley v. Colt*, 5 Wall. 119. The same principle is recognized in the decisions which sustain the validity of private statutes authorizing sales of property belonging to infants, estates of deceased persons, &c.—*Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369; *Chappell v. Williamson*, 49 Ala. 153; *Todd v. Spence*, at the last term; *Watkins v. Holman*, 16 Peters, 25.

STONE, J.—Pleasant May, sr., by two deeds, bearing date severally, November 3, 1836, and July 17, 1841, conveyed real and personal property to James May, “in trust for Sarah Tindal, the wife of Harvey Tindal, and the heirs of her body, excepting the girl Mary, which is in trust for Jane Tindal, the daughter of Harvey and Sarah Tindal. The above land is to be held, and the above negroes to be held, kept together by the said James May, for the support and maintenance of the said Sarah Tindal, and any children that she now has, or that she may hereafter have during the natural life of the said Sarah Tindal; then it is to be equally divided between the children of the said Sarah Tindal, with the exception of the negro girl Mary. But the said James May is hereby authorized and empowered, should he think proper, by obtaining the consent of the said Sarah Tindal, to dispose of all or any part of the above mentioned land or negroes, for the benefit of the said Sarah Tindal and her children; or, should he think proper to give off, to any of the children of the said Sarah Tindal, his or her share, he is hereby authorized and empowered so to do, by and with the advice and consent of the said Sarah Tindal first had and obtained.” The above is extracted from the first of the deeds, and conveys lands and slaves. The second is in substance the same, and conveys lands only. Each was upon a good, not a valuable consideration. James May, the trustee, died; and in June, 1850, Harvey Tindal, husband of said Sarah, was appointed trustee in his stead, by the Chancery Court of Greene county. During the year 1853, the said

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Harvey Tindal died, and Philip P. May was appointed trustee in his stead, by the Chancery Court aforesaid.

With the products or profits of the property conveyed by said deeds of Pleasant May, the lands here in controversy were purchased and paid for. Four of the tracts were conveyed to Harvey Tindal, in trust for his wife, Sarah Tindal, and her children. A fifth deed was made to Philip P. May, after his appointment as trustee; and all the deeds expressed that the conveyances were in trust for Sarah Tindal and her children. Some of them contain a power of sale, similar to that contained in the deeds of Pleasant May, while others omit it. We regard, however, all the lands as springing out of the trusts created by the two deeds of Pleasant May, and charged with the trusts, and impressed with the powers therein expressed. Philip P. May tendered his resignation as trustee to the Chancery Court; and under its order, he settled his accounts, and showed that nothing was due from him as trustee. The account was allowed and passed, but the chancellor refused to discharge him, and dismissed his petition therefor, because the register was unable to procure another trustee who would accept the trust and give the bond required by the chancellor.

In this stage of the proceeding, and before the chancellor had finally acted on Philip May's petition for discharge, the act "for the relief of Sarah Tindal and other persons therein named," was passed; see Pamph. Acts, 1859-60, p. 670. Its language is: "That James M. Tindal be, and he is hereby, declared and appointed trustee for Sarah Tindal and her children, under and by virtue of certain deeds in trust made for their benefit and support by Pleasant May, sr., late of Greene county, with full power and authority to take possession of, control, and manage the said trust estate, in the same and as ample a manner as the trustee named in said trust would or could do if he were living." Section 2: "That the said Philip P. May be, and he is hereby, authorized and required to account with the said James M. Tindal, for all the money, property, and effects belonging to said trust estate, which have come into his hands or possession as such trustee; and on his fully accounting for such money, property and effects, and delivering the same to the said James M. Tindal, the said Philip P. May shall be fully discharged and released from his said trusteeship." Approved, February 9, 1860.

Under this act, Sarah Tindal and James M. Tindal, the latter executing as trustee, on February 21, 1863, by deed of bargain and sale, reciting the said trust of Pleasant May, and the desire of said Sarah Tindal, and consent in writing,



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that said lands be sold to William B. Drake, sold and conveyed said lands to said Drake, in consideration of seven thousand one hundred and sixty-six 67-100 dollars, in hand paid; and put said Drake in possession. When said act was passed, and when said conveyance was made to Drake, there were one child and grand-children living, who were minors, and tenants in vested remainder of undivided interests in said lands. The testimony shows, we think, that Mrs. Tindal and her adult children, or the most of them, desired the enactment of the statute, and desired the sale should be made. The main question presented by this record is, did the act recited above authorize James M. Tindal to sell and convey the lands, and was the title divested out of the Tindal heirs by the sale and conveyance? Had the legislature power to appoint James M. Tindal trustee under the deeds? It is contended for appellant, that the appointment of a trustee is in its nature judicial, and the constitution denies to the legislature the exercise of judicial functions.

We think we may lay it down as a rule, that judicial action is the application to persons or things of legal sequences from facts agreed, or judicially ascertained. It implies parties, an issue of law or fact, one or both, and judgment pronounced, affecting rights of person or of property. Sometimes, the public is one of the contesting parties; as the commonwealth, when it charges some crime, or *quasi* criminal offense; or the people in their collective capacity, as in proceedings strictly *in rem*. Still, there must be an issue, express or implied, or judgment rendered, which declares or qualifies some right affecting life, liberty, or property. Less than this is not a judicial function; is not judgment.

The three departments into which the powers of constitutional government are divided—legislative, executive, and judicial—are not so distinctly separated and marked, as that it is always easy to determine under which head any and every given power will fall. Legislative and executive functions frequently depend on the ascertainment of facts, or conclusions of fact, and the drawing of inferences or conclusions therefrom. There is scarcely an act, public or private, which does not, to some extent, call the judgment into exercise. On the other hand, judicial powers are largely dependent for their efficiency—their vital existence—on the exercise of powers purely executive or ministerial. Judges of courts, and the courts themselves, are often clothed with official powers which are ministerial, not judicial.

Speaking of the power of the legislature to direct the sale of an infant's land, for reinvestment in other property, deemed more advantageous to the infant, the Supreme Court



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of Massachusetts, in *Rice v. Parkman*, 16 Mass. 326, said: "But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties: it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of law for its due exercise; but still partaking, in no degree, of the characteristics of judicial power." And so, the power of the legislature to grant the order was maintained. So, in *Cochran v. Van Surlay*, 20 Wend. 365, it was ruled—Chancellor Walworth delivering the opinion in the Court of Errors—that "a private act of the legislature, authorizing a sale of the estate of infants, for their maintenance and education, is within the scope of the legitimate authority of a State legislature." So, in *Williamson v. Williamson*, 3 Sm. & Mar. 715, the High Court of Errors and Appeals of Mississippi decided, that "when a sale is made by virtue of a private act of the legislature, authorizing the sale of an intestate's estate, the titles acquired under it, if the proceedings are regular, are valid." This subject is fully discussed by Judge Cooley, in his work on Constitutional Limitations, marg. page 98; and he states, as the rule deducible from the authorities, "If the party standing in the position of trustee applies for permission to convert by a sale the real property into personal, in order to effectuate the purposes of the trust, and to accomplish objects in the interest of the *cestui que trust* not otherwise attainable, there is nothing in the granting of permission which is in its nature judicial."—See Cooley's Const. Lim., marg. pages 97 to 105, and notes.

This question has been frequently before this court, and has been uniformly decided in favor of the power.—See *Holman v. Bank of Norfolk*, 12 Ala. 369; *Chappell v. Williamson*, 49 Ala. 153; *Todd v. Spence*, 56 Ala. 99. See, also, *Watkins v. Holman*, 16 Pet. 25; *Stanley v. Colt*, 5 Wall. 117; *Chandler v. Douglass*, 8 Blackf. 10; *Brevoort v. Grace*, 53 N. Y. 245.

Nor can we think that, on principle or authority, the appointment of a trustee to execute the powers of a trust deed, in which infants are beneficiaries, is any more an exercise of judicial power, than is the granting of an authority to sell land. Neither of these powers operates a transfer of the beneficial interest in property, from one person to another. Under our statute, the registers in chancery have the power to appoint trustees of express trusts, created by deed or will. Code of 1876, § 3792. In *Holman v. Bank of Norfolk*, *supra*, the statute not only authorized a sale of lands lying in this

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State, but appointed the person, a resident of Massachusetts to make the sale; a sale was made, and this court decided that the title passed by the sale. In *Watkins v. Holman*, 16 Pet. 25, the same statute received the same construction in the Supreme Court of the United States. In *Howard v. Thornton*, 50 Mo. 291, the court declared, that "the general power of the legislature to appoint trustees to execute trusts cannot be questioned." In *Carroll v. Olmstead*, 16 Ohio, 251, a special statute had been enacted, authorizing a sale of lands for partition, and appointing three named commissioners to make the sale; they did sell and convey, and it was ruled that the title passed by the sale thus made. In *Williamson v. Suydam*, 6 Wall. 723, it was ruled, that "a statute authorizing the chancellor of the State to discharge trustees named in a will (the purpose of the trust being to hold real estate, and to pay the rents to persons named for life, and on his death to dispose of the fee to his children), and to appoint new trustees in their place, is valid; it appearing that the act was passed with the knowledge, and at the request of the original trustees." In *Carey v. Giles*, 9 Geo. 253, the legislature had appointed a receiver to take charge of and disburse the assets of an insolvent bank; it was held that this was not judicial action, and that the appointment was valid.—See, also, *McComb v. Gilkey*, 29 Miss. 146; *Lathrop v. Stedman*, 42 Conn. 583, 591, to same effect as *Howard v. Thornton*, *supra*; *Stewart v. Griffith*, 33 Mo. 13; *Garnett v. Leonard*, 47 Mo. 205.

The decision of this court in *Gaines v. Harvin*, 19 Ala. 491, can not be maintained on any other ground, than that the appointment of a trustee is ministerial, not a judicial function. If judicial, the register could not have been empowered by the legislature to make it, according to the theory and argument of that opinion.

Philip P. May had tendered his resignation, and desired to be relieved of the trust. He also recommended the appointment of James M. Tindal, as his successor. These facts bring this case directly within the influence of *Williamson v. Suydam*, 6 Wall. 723. We hold, that the legislature did not transcend its power in the appointment of James M. Tindal as trustee, and that he succeeded to all the powers conferred on James May, by the two deeds of Pleasant May. On this question, we fully concur with the chancellor in his excellent opinion and argument.

The original bill, "Exhibit 4," shows that an undivided half-interest in the "Candie's landing" property, containing about one hundred acres, was conveyed by John May and wife to Harvey Tindal, to be held by him as trustee of his

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wife and children, under the trusts expressed in the deeds from P. H. May. The amended bill charges, that there was subsequently purchased, and paid for with the trust funds aforesaid, a one-third interest in the same "Candie's landing" property, under the following circumstances: The bill charges that the said one-third interest, while Philip P. May was acting as trustee, was decreed to be sold by order of the Probate Court, and was sold as the property of the estate of John May, deceased, by Sydenham Moore, his administrator; and that, at said sale, Patrick May purchased said one-third interest, for the benefit of said trust estate, and that it was paid for with money belonging to said trust fund; but that the title to said one-third was, by mistake, conveyed directly to said Sarah E. Tindal. The bill seeks to have this undivided third of the property, known as "Candie's landing," set apart to the tenants in remainder, Mrs. Tindal having died before the bill was filed. We do not find this deed in the record. The answer admits this averment, with the single exception, that it denies that this interest was paid for with trust money, "but alleges that they were bought by said Patrick May, for Sarah E. Tindal herself, and said one-third became and was her property." The only testimony on this question is that of the witness Dunlap, who proves that this interest was paid for with the profits of the trust property. We regard this proof as sufficient to establish this averment of the amended bill, and shall treat this undivided third interest of the "Candie's landing" property as belonging to the trust estate. The deed of James M. and Sarah E. Tindal to William B. Drake, "Exhibit 6" to the original bill, conveyed only a half interest in the property known as "Candie's landing," and thus left this one-third interest in the trust estate. The complainants are entitled to this one-third interest, and to an account of rents and profits, subject to a rebate for improvements made, and taxes paid. In the present state of the record, we are somewhat embarrassed in giving proper directions for the partition of the property, and for the taking of the account; and we will remand the cause to the Chancery Court, that the proper orders may be there made.

Reversed and remanded, to be disposed of according to the principles of this opinion. Let the costs of the appeal be paid, in equal moieties, by the adult appellants and the adult appellees.



[Ridgway and Wife v. Glover et al.]

**Ridgway and Wife v. Glover et al.***Statutory Action in Nature of Ejectment.*

1. *Amendment of sheriff's deed, in description of land.*—When a sheriff, by mistake, in advertising lands for sale under an execution, or order of sale from the Circuit Court, misdescribes a portion of the tract, as by inserting the north-east instead of the south-east quarter of the section, and the mistake is carried into his deed to the purchaser; he may, by leave of the court, pending an action by the purchaser against the defendant in execution for the lands, correct the erroneous description in the deed; and when the amendment is thus made under the order of the court, and in its presence, it relates back to the date of the deed, and entitles the plaintiff to a recovery.

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APPEAL from the Circuit Court of Greene.

Heard before the Hon. LUTHER R. SMITH.

This action was brought by Mary S. Glover and Francis L. Constantine, against Bradley H. Ridgway and Mary E. Ridgway, his wife, to recover the possession of a certain tract of land, together with damages for its detention; and was commenced on the 7th March, 1874. The lands sued for were described in the original complaint as "the north-east quarter of the north-east quarter, and the west half of the north-east quarter of section eight (8), and the north-west quarter of section fourteen (14), township twenty (20), range two (2), east, lying in Greene county;" but the complaint was amended, by leave of the court, by striking out the word *north-east*, where it first occurs, and inserting *south-east*. The plaintiffs claimed the lands under a purchase at a sale made by the sheriff of said county, on the first Monday in February, 1874, under several orders of sale from the Circuit Court of said county, which were founded on judgments rendered against said Ridgway and wife, in favor of said Mary S. Glover, F. L. Constantine, and one Isaac N. Snedecor; the lands being subjected to sale, under said judgments, as belonging to the statutory separate estate of Mrs. Ridgway. In the several orders of sale, the lands were correctly described, as in the amended complaint; but, by mistake, in the advertisement of the sale, the sheriff inserted the *north-east* (instead of the *south-east*) quarter of the north-east quarter of said section eight, and the same mistake was made in his deed to the purchasers. The sheriff testified, that this mistake was made by accident, or inadvertence, on his part, "but that he had in fact sold, or intended to sell, the lands men-

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tioned in the order of sale ;" to the due admission of which evidence the defendants excepted. The court allowed the sheriff, on motion of the plaintiffs, to amend his deed in the description of the land ; and the amendment having been made in the presence of the court, allowed the deed as amended to be read to the jury, and instructed them, in effect, that, in connection with the order of sale, and the judgments on which they were founded, it entitled the plaintiffs to recover ; to which ruling and charge, each, an exception was reserved by the defendants. The admission of the evidence objected to, the allowance of the amendment, and the charge to the jury, are now assigned as error.

W. P. WEBB, for the appellant.—To entitle the plaintiffs to recover, it was necessary for them to show a judgment, execution (or order of sale), and a sheriff's deed for the premises.—*Ware v. Bradford*, 2 Ala. 676 ; *Pollard v. Cocke*, 19 Ala. 188. The sheriff's deed did not convey the south-east quarter of the north-east quarter of section eight, and the plaintiffs had no title to it when the action was brought. At law, the deed was conclusive : the mistake could only be corrected in a court of equity.—*Hogan v. Smith*, 16 Ala. 603.

SNEDECOR & COCKRELL, *contra*. (No brief on file).

BRICKELL, C. J.—This was a real action under the Code, for the recovery of several parcels of land, titles to which the plaintiffs (the appellees) claimed under a purchase at a sale by the sheriff of Greene county, made under several orders of sale issued from the Circuit Court of that county. These orders were founded on judgments rendered against the defendant (appellants), and directed the sheriff to sell, among other lands, the south-east quarter of the north-east quarter of section eight, township twenty, range two, east. The sheriff, by inadvertence, advertised the *north-east* (instead of *south-east*) quarter of section eight, and the misdescription was carried into the deed he executed to the appellees. It was clearly shown, that the land intended to be sold, and which was actually sold, was the south-east, and not the north-east quarter ; and the misdescription in the advertisement of the sale, and in the deed, was a mere mistake committed by the sheriff. No evidence was offered that any injury had resulted from the mistake—that purchasers were misled, or that, if correctly described, the land would have sold for a greater sum. The court, on motion of the plaintiffs, permitted the sheriff to correct the deed, by striking out the north-east quarter, and inserting the south-east quarter,

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so that, in the description of the lands, the deed would conform to the order of sale, and pass the lands really sold and intended to be conveyed; and no evidence being given in defense, and the judgments, orders of sale, and the sale and conveyance being proved, instructed the jury, that the plaintiffs were entitled to recover. The defendants objected to the correction of the deed; the objection was overruled; and exceptions were reserved to the instructions given the jury, and to the disallowance of the objection to the correction of the deed.

The case is thus resolved into a single question—the authority of the court to order the correction of the deed, and the effect of such correction: whether, if properly allowed, it has relation to the time of the sale, and will support the present action commenced before it was made. Courts exercise over ministerial officers, whose duty it is to issue or execute their process, a general superintendence and control, not only to prevent the abuse, but to direct and compel the proper execution of such process.—*Mobile Cotton Press v. Moore*, 9 Port. 679. “The power of the sheriff, in this State, under *fiery facias*, to sell land, receive the purchase-money, indorse the sale and receipt of the purchase-money on the *fiery facias*, and execute a conveyance to the purchaser, is not a mere naked power, but a power coupled with a trust. It is a power which it is the duty of the sheriff to execute made his duty *by law*, which has given him an interest extensive enough to enable him to discharge it. It is not given him as a mere power, but as a trust and duty which he ought to fulfill; and his omission to do so, by accident or design, ought not to disappoint the object for which the power in the nature of a trust was conferred by the law.”—*Stewart v. Stokes*, 33 Ala. 494.

The only difference between the power and duty of a sheriff under a *fiery facias*, and under an order directing him to sell specific property, is, that in the latter case, his authority is confined to the particular property—he can sell and convey no other. His duty to sell and convey is the same as if he had levied on it a *fiery facias*. A sale by him, improperly made, the court, on a proper application, would set aside. From the process of the court, his authority to sell, and to execute the statutory power of conveying, is derived. The purchaser could obtain from the court an order compelling a conveyance, if, on demand, he refused to execute it. No other court than that from which the process issued could compel him to convey. Courts of equity do not, except in peculiar cases, to relieve against fraud or accident, intervene to aid the execution of mere statutory powers. Mistakes



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will occur in the execution of official deeds, as they often occur in deeds or contracts between individuals in private transactions. The security of suitors, and of purchasers, requires that the court issuing the process, having an inherent power to superintend and control its execution, should intervene, and correct such mistakes.

If a sheriff, directed to sell particular property, should, by accident or design, sell other property, the court could not hesitate to vacate the sale, though it may be void. If he should really sell other property, but his conveyance should recite a sale, and should convey the property ordered to be sold, it would be the duty of the court to prevent the abuse of its process, by setting aside the sale. Or, if an irregular sale, of prejudice to the parties in interest, is made, the court has power to vacate it. The power of the court is plenary for the correction of the misfeasance, malfeasance, or nonfeasance of its ministerial officers, in the issue, or in the execution of its process. Where a sheriff, by mistake, in the conveyance to the purchaser, misdescribes the lands he has sold, he may, under the supervision of the court from which the process issued, make a new deed, describing the lands sold properly.—*Ware v. Johnson*, 55 Mo. 500; *Freeman on Executions*, § 332. Such a mistake, in a deed made by an individual, could be corrected by the execution of a new deed, or by any proper instrument in writing, between the parties. The sheriff is the officer of the court, and may be by the court compelled to do that which he ought to do as an individual, if acting individually, and his individual rights were involved. A court of equity alone would have jurisdiction to reform the deed, and conform it to the intention of the parties, if it was not made officially by the sheriff. The court of law, in compelling the correction of such mistakes, does not infringe the jurisdiction of a court of equity. It exercises only its inherent power to superintend the execution of its process, for the protection of its suitors, and of purchasers at sales made by authority of its process. The manner in which the correction is made, must rest largely in the discretion of the court. Ordinarily, the court should order a new deed to be executed, and the former deed surrendered and cancelled, avoiding the registration of two seemingly inconsistent conveyances, and the existence of a conveyance which, it may be, would cast a cloud on the title of the lands the first conveyance improperly purports to pass. But when, as in this case, the conveyance is of several parcels of land, one of which only is misdescribed, we cannot say the court errs, in directing the correction of that error, by striking out the erroneous, and inserting the correct description, there

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being in the presence of the court a redelivery of the conveyance.

What may be the operation of the new or corrected deed, except as between the parties to the process, the sheriff, and the purchaser, is not an inquiry involved in this case; and we say nothing as to the rights of strangers, or purchasers, not having notice of the mistake.

The new or corrected deed stands in the place of the original deed, and takes effect from the day of its execution. Its purpose, and its whole operation, is to give effect to the sale. No new rights are acquired by it—simply, the only proper and legal evidence of the rights the purchaser acquired at the sale is given under the supervision of the court. When a contract is reformed, by decree; of a court of equity, the contract as reformed speaks from the day it was made, and not from the decree, for the decree merely ascertains and declares the contract as it was intended when made. The deed, as corrected under the order of the court, had relation to its original execution, and from that day passed the right to enter on the premises.—*Thornton v. Miskimmon*, 48 Mo. 219.

We find no error in the rulings of the Circuit Court, and its judgment must be affirmed.

## Jacobson & Co.'s Assignees v. Sims, Harrison & Co.

### *Motion by Assignees in Bankruptcy for Dissolution of Attachment.*

1. *When assignee must intervene in attachment suit.*—If goods are fraudulently transferred by a debtor, in anticipation of bankruptcy, and are omitted from his schedules, the title of the fraudulent grantee becomes perfect, as against the assignee in bankruptcy, or a trustee appointed by the creditors, unless the latter asserts his claim within two years, as required by the second section of the bankrupt law; and if a creditor attaches them in the hands of the fraudulent grantee, and pursues them through a protracted and expensive litigation for three or four years, without any intervention or claim on the part of the assignee or trustee, the latter can not then have the attachment dissolved, because it was sued out within four months before the commencement of proceedings in bankruptcy, and claim the goods, or their proceeds, as part of the bankrupt's estate.

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APPEAL from the Circuit Court of Sumter.  
Tried before the Hon. LUTHER R. SMITH.

[Jacobson & Co.'s Assignees v. Sims, Harrison & Co.]

This was a motion by William W. Henry and J. W. Smith, as assignees of Jacobson & Co., bankrupts, or trustees elected by the creditors of said bankrupts, to dissolve an attachment sued out by Sims, Harrison & Co. against said Jacobson & Co., on the ground that it was sued out within four months before the commencement of the proceedings in bankruptcy. The attachment was sued out on the 16th April, 1872, on the ground that said Jacobson & Co. were non-residents of Alabama; and it was levied on a stock of goods in the possession of one Joseph Zimmern, who was also summoned by garnishment as the debtor of said Jacobson & Co. At the return term, in October, 1872, the attachment was quashed, on motion of said Jacobson & Co.; but, on appeal to this court, at its June term, 1874, the judgment was reversed, and the cause remanded, as shown by the report of the case: *Sims, Harrison & Co. v. Jacobson & Co.*, 51 Ala. 186-90. On the 1st May, 1872, said Jacobson & Co. filed their petition in the District Court of the United States for the southern district of Mississippi, in which district they resided, asking to be discharged as bankrupts; and they were adjudged and declared bankrupts on the same day. At a meeting of their creditors, held on the same day, the plaintiffs in this motion were elected trustees of the bankrupts' estate, and their selection was approved by the court; and on the 20th May, 1872, an assignment was executed by the bankrupts, conveying all their estate and property to said trustees. The proceedings had in the attachment suit after the remandment of the cause by this court, and the litigation growing out of it, are stated in the opinion of the court. At the April term, 1876, the trustees first submitted their motion to dismiss the attachment, on the ground that it was sued out within four months before the commencement of the proceedings in bankruptcy. The court overruled the motion, "and condemned the property attached to the satisfaction of plaintiffs' claim against said Jacobson & Co.; to which action of the court the said trustees then and there excepted," and they here assign it as error.

SNEDECOR & COCKRELL, for appellants.—By the 14th section of the bankrupt act, so soon as an assignee is appointed and qualified, and an assignment to him of the bankrupt's estate has been executed, "such assignment shall relate back to the commencement of said proceedings in bankruptcy; and thereupon, by operation of law, the title to all such property and estate, real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attach-



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ment made within four months next preceding the commencement of said proceedings." But the attachment is legal and valid, until dissolved; the proceedings in bankruptcy must be presented by a proper party, before a judgment of dissolution can be rendered; and it is the duty of the court to proceed with the cause, until properly informed of the changed relations of the parties.—*Elyster v. Gaff*, 1 Otto, 521; *Sims, Harrison & Co. v. Jacobson & Co.*, 51 Ala. 190; *In re Houseberger*, 2 Bank. Reg. 92. The assignee is the proper party to appear in the State court, and have the attachment dissolved on motion.—50 Georgia, 302. The attached property is in the possession of the court, and not of the attaching creditors.—*Johnson v. Bishop*, 8 Bank. Reg. 533. No time is specified, within which the assignee must intervene. The limitation of two years, prescribed by the second section of the bankrupt law, for suits by or against "any person claiming an adverse interest," does not apply to the case. The statute of limitations does not begin to run, until there is some one entitled to sue, and some one liable to be sued. Cases cited in 2 Brickell's Digest, 220, § 35. Here, the attaching creditors could not be sued: they had no estate whatever in the attached goods, or in the proceeds of sale, until a condemnation thereof to their judgment when rendered; and their inchoate lien, acquired by the levy of the attachment, was not held adversely to the assignees, but subject to their right to intervene. So far as this question is concerned, the present bankrupt act is similar to the act of 1841; under which, the construction for which appellees here contend, as to the meaning of the word "*suit*," was repudiated by the Supreme Court of Pennsylvania, in *Union Canal v. Woodside*, 11 Penn. 176. The limitation applies only to disputes about property to which adverse claims existed while in the hands of the bankrupt, and before assignment; as to which, a short statutory bar was deemed expedient.—39 N. Y. 302; 5 Blatch. 54. A petition for the distribution of a fund, lodged in the court, is not within the limitation of two years.—4 Bank. Reg. 553.

R. H. & G. L. SMITH, with JAMES COBBS, *contra*.—The 14th section of the bankrupt act, as to the dissolution of an attachment sued out within four months before the filing of the petition in bankruptcy, was intended to provide a remedy for the recovery of property taken by the levy from the possession of the bankrupt himself, and to place the property in the possession of the assignees, or trustees, for the benefit of his creditors. Here, a dissolution of the attachment would only restore the property to Zimmern, from whose possession

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it was taken, and whose title to it, as against these attaching creditors, has been judicially determined to be worthless; and from whom, moreover, the trustees could not recover it, being barred by the limitation of two years. The 14th section of the law can have no application to such a case, but the trustees should have proceeded by a suit in equity under the 35th section. The trustees may, or may not, at their election, intervene in a pending attachment suit; but, if they do intervene, it must be by a motion or petition in which they are the actors, and the attaching creditors are the defendant; and such proceeding is a new and independent suit, presenting new issues, and involving different rights. That such a proceeding is a suit, and therefore within the limitation of two years, see *Story's Com. on Constitution*, vol. 3, § 1719; *Weston v. City Council of Charleston*, 2 Peters, 464. The said 14th section, in giving the assignees a right to have an attachment dissolved, and in vesting in them all the property of the bankrupt, uses language equally strong; yet, a suit to recover such property, not in the possession of the bankrupt, must be brought within two years.—*Comegys v. McCord*, 11 Ala. 932; *Harris v. Collins*, 13 Ala. 388.

MANNING, J.—*Jacobson & Co.* were doing business as merchants at Meridian, Mississippi, and, on the 1st of May, 1872, filed their petition to be adjudged bankrupts, and discharged as such. With their petition, they filed schedules, alleged to be complete, of all their partnership property and effects, but none of their individual estates, for the reason that they had no individual property, as they said, and owed no debts as individuals, from which they desired to be released. Nevertheless, they asked leave to file additional schedules, if found necessary, by way of amendment. At the first meeting of their creditors, on the 20th of May, three-fourths in value of those who proved their claims elected and resolved, in accordance with one of the sections of the bankrupt law (§ 5103, Rev. Stat. U. S.), that the estate of the bankrupts should be wound up and settled, and distribution made among the creditors, by trustees, under the direction of a committee of the creditors; and they elected appellants trustees, and *Charles Hopkins & Co.*, and *Taylor & Co.*, of Mobile (among the largest creditors), the committee; which action of the creditors was confirmed by the court. About a month before this time, *Sims, Harrison & Co.*, appellees in this cause, being creditors of *Jacobson & Co.*, to a considerable amount, had, in April, 1872, and before the application of the latter to be declared bankrupts, sued them by an attachment against their property, returnable into the Cir-

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cuit Court of Sumter county, Alabama, and had it executed by a levy upon merchandise found in possession of Joseph Zimmern in that county, as the property of Jacobson & Co., and by having Zimmern and one Wise severally summoned to answer, as garnishees, what they were respectively indebted &c. to Jacobson & Co. Wise answered, acknowledging an indebtedness of a few hundred dollars. Zimmern made no answer; but having claimed the goods attached as his own, the sheriff required of Sims, Harrison & Co. an indemnifying bond, with sureties, to the amount of \$10,000, for his protection against damages for making the levy; and on this bond Zimmern, in September of the same year, sued them and their bondsmen for that sum.

Jacobson & Co. did not report the goods thus levied on to the bankrupt court, as their property, nor did the trustees set up any claim to them, except as will be hereafter shown. But in October following, when Sims, Harrison & Co. filed their complaint in the attachment cause, Jacobson & Co. appeared specially therein, and pleaded in abatement certain defects in the papers, and that the goods attached did not belong to them, and that the levy was made within four months of the time before they were adjudged bankrupts. Out of the pleas grew motions, on the part of Sims, Harrison & Co. for leave to amend the defects in their papers, and, on the part of Jacobson & Co., for a dissolution of the attachment; which motions were decided in favor of Jacobson & Co., in the Circuit Court, and against them on appeal to this court; from which the cause was remanded for further proceedings therein below.—*Sims, Harrison & Co. v. Jacobson & Co.*, 51 Ala. 186. In the meantime, about three years had elapsed; during all which time, Zimmern's suit against Sims, Harrison & Co., conducted by the same attorneys who were representing Jacobson & Co. in the other, was suspended in the Circuit Court. About a year afterwards, April 21st, 1876, upon a trial by jury, a verdict was rendered in the cause against Zimmern, deciding that the goods he claimed were subject to the attachment in favor of Sims, Harrison & Co. against Jacobson & Co. Thereupon, *Henry and Smith*, who were elected four or five years before, by the creditors of the bankrupts, as trustees for them, immediately intervened, by the same attorneys who had represented Jacobson & Co. and Zimmern throughout, and moved the court "to dissolve the attachment in this case, upon the ground that the same was sued out within four months of the commencement of the said bankrupt proceedings, and that the money for which the goods, which were perishable, had been sold, be paid over to them as trustees."



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This motion was overruled, and Sims, Harrison & Co. and the trustees having thus all become parties to the cause, by agreement, through their attorneys, 'all parties consenting to try the issues before the court, without the intervention of a jury,' the judge, upon the evidence, and admission of the discharge in bankruptcy of Jacobson & Co., considered that no personal judgment should be rendered against them, but that plaintiffs were, in effect, entitled from the proceeds, so far as sufficient, of the property and effects attached, to have \$6,739.24, besides the costs of suit, and that after the costs were paid, the residue of the proceeds, not to exceed the amount of the judgment, should be paid to the plaintiffs. Judgment was entered accordingly; and Henry and Smith, the trustees, have appealed to this court, claiming to be entitled to the money adjudged to Sims, Harrison & Co., and assigning as error the ruling and judgment of the Circuit Court to which they excepted.

The judgment of the court below was, probably, based upon the opinion, that appellants should have intervened with their motion to dissolve the attachment, or get possession of the attached goods, within the two years which the bankrupt law prescribes as a bar to any suit by or against an assignee or trustee. But they contend, that this limitation does not relate to suits for goods and effects that should have gone with the property surrendered by the bankrupts, but were kept back by collusive arrangements between them and a third person; and that whenever it is ascertained that they belonged to the bankrupts, the trustees have a right to demand them. Without considering any other question that might arise, let us see what was the situation in the present case.

The goods in controversy were in possession of Zimmern: they were transferred to him in March, 1872: he, residing in an adjoining county to that in which Jacobson & Co. resided, but in another State, held and claimed them there as his own; and Jacobson & Co. did not mention them in the schedule, which they swore contained a list of all their property. Here, then, were goods, held adversely to them, and to the trustees. The former could not recover them at all; and Zimmern would evidently have acquired a good title against the trustees, by their mere omission to sue him for them within two years, if he had retained them so long. This would hardly be disputed. In that situation, the goods were lost to the creditors, if not sued for within two years. But Sims, Harrison & Co., believing that they were about to be defrauded, sued out an attachment, and had the goods taken, not from Jacobson & Co., who disclaimed all interest in them, but from Zimmern. The controversy, therefore, was with him.

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The trustees might also have sued him; and if necessary to enforce their superior rights under the bankrupt law, might have also sued the attaching creditors with him. But, by failing for two years to assert any title against Zimmern, his title would have become good against them. When, therefore, the attaching creditors afterwards obtained a judgment for the goods, or the proceeds of them, against Zimmern, they did not get anything in which the trustees had, or could then assert, any interest whatever. Upon what principle can they claim, from the attaching creditors, the fruits of their long and expensive litigation with Zimmern, about property which, in his hands, was perfectly secure from them? Shall the diligence and risks of these creditors, in their own behalf, be imputed, and the results of their struggle be appropriated, to the trustees, who have done nothing, or to the other creditors, whose committee have stood by without raising a hand, while the attaching creditors were carrying on their contest against the fraudulent bankrupts and their fraudulent grantee, year after year, and in court after court? That would be an injustice which the law can not sanction.

Besides, there is nothing in this record to show that these goods, which were in Zimmern's hands, were at any time subject, or could have been made subject, to the debts mentioned in the bankrupt schedule. The goods were transferred to Zimmern, in March. When those debts were contracted—whether before or after that time—does not appear. The petition mentioning them was filed in the bankrupt court in May. True, it is very probable, from the amount of the indebtedness reported, that some of it was contracted before March. But, on the other hand, Jacobson & Co. may not have owed a dollar of them then. Their bankruptcy may have suddenly been brought on, by unfortunate dealings with those creditors, and heavy losses consequent thereon, or otherwise; and it might have been that it was only against Sims, Harrison & Co., that the transfer of the goods to Zimmern was void. The decisions of courts must be founded on evidence, not conjectures. "The record of a judgment rendered against the defendant in execution, after his sale to the claimant" [however short the time before], "is not admissible evidence against the claimant, to prove an indebtedness prior to its rendition." *Snodgrass v. Br. Bank*, 25 Ala. 161. And there is nothing in this record to show that any of the persons reported as creditors of Jacobson & Co., in their schedule, became such one week before the schedule was filed.

There is no error against appellants; and the judgment of the Circuit Court is affirmed.

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**Kirksey v. Snedecor.**

*Bill in Equity by Creditor, to set aside Conveyances as Fraudulent.*

1. *Voluntary and fraudulent conveyances.*—The settled law in this State is, that a voluntary conveyance, or a conveyance on consideration not deemed valuable in law, is inoperative against existing creditors, and voidable at their instance, without regard to the intent with which it was made, or the present ability of the grantor to pay his debts; but subsequent creditors can not avoid it, without proof of actual or intentional fraud, nor can they be allowed to participate in the proceeds, when it is set aside at the instance of existing creditors, without proof of actual or intentional fraud.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

These were three cases, which were submitted, argued, and decided together. Each of the bills was filed on the 9th February, 1874, by Foster M. Kirksey, as a creditor of the estate of J. J. Little, deceased, on behalf of himself and such other creditors as might come in, make themselves parties, and contribute to the expenses of the suit, against the administrators, widow, and children of said Little; and sought to set aside several conveyances, hereinafter more particularly described, on the ground that they were voluntary and fraudulent, and to subject the lands to the satisfaction of the debts due to the complainant and other creditors. Said J. J. Little died on the 22d February, 1872, and his estate was regularly declared insolvent by the Probate Court of Sumter, in which county he lived and died. At the time of his death, he was indebted to the late firm of Kirksey & Carpenter, commission-merchants in Mobile, in the sum of \$12,670.37; and on the dissolution of said firm, the debt became the property of said F. M. Kirksey, the complainant, who, on the 13th October, 1873, after the said declaration of insolvency, obtained a judgment against the estate of said Little for \$14,023.30. The conveyances which the bills sought to set aside, five in number, were as follows: 1st, a conveyance by James M. Hibler and wife, of a tract of land containing about four hundred acres, which was dated the 2d September, 1867, recited the payment of \$6,400 as its consideration, and conveyed the lands to Mrs. Sallie A. Little, the wife of said J. J. Little, during the life of her said husband, and at his death to his heirs; 2d, a conveyance by Mary



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Beatty, of the house and lot in which said Little resided at the time of his death, which is nowhere set out in the record, but which is said to have been executed on or about the 15th February, 1868, and to have conveyed the property directly to said Little's wife; 3d, a conveyance by Turner Reavis and wife, of a tract of land containing forty acres, which was dated the 9th April, 1868, recited the payment of \$470 in gold as its consideration, and conveyed the lands to Mrs. Sallie A. Little for life, then to her said husband for life, if he survived her, and on his death, or her death if she survived him, to the persons who would be his heirs at the time of his death; 4th, a conveyance by the administrator of the estate of Nelson A. Rogers, deceased, of several lots on the river front in or near the town of Warsaw, which was dated the 19th December, 1870, recited that the sale was made, under a decree of the Probate Court, on the 11th April, 1870, and that Mrs. Sallie A. Little had become the purchaser, at the price of \$900, which had been paid, and conveyed the lands directly to her; and, 5th, a conveyance by Turner Reavis and wife, of a tract of land containing about eighty-eight acres, which was dated the 28th September, 1871, recited the payment of \$880 as its consideration, and conveyed the land to Mrs. Sallie A. Little for life, and at her death to such child or children, born of her marriage with her said husband, as might then be living. The bill alleged that all of these conveyances were voluntary—that the purchase-money was in fact paid by said J. J. Little; that he was largely indebted at the time, and that the conveyances were made to his wife and children with the intent to hinder, delay, and defraud his creditors, and to place the property beyond their reach. Answers were filed by the defendants in each case, denying that the conveyances were either fraudulent or voluntary. The testimony was the same in all the cases. The material facts are stated in the opinion of the court, and in the briefs of counsel; and a further statement is not deemed necessary. On final hearing, on pleadings and proof, the chancellor dismissed the bill in each case; and his decrees are now assigned as error, with several rulings on questions of evidence, which, under the agreement of counsel, require no special notice.

SMITH & COBBS, with whom was THOS. W. COLEMAN, for appellants.—The prominent fact disclosed by all these conveyances, except one, is, that the enjoyment of the estate by the husband and wife, during their lives, is carefully guarded, with remainder to their children (or heirs), while the property is put beyond the reach of the husband's creditors at

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law. In one of them, the benefit of a life-estate is expressly reserved to him, if he should survive his wife; in all of them, a statutory separate estate is created in the wife, of which the husband has the control, management, and enjoyment; and the ultimate remainder, in all of them, is to his heirs. If the purchase-money was paid by J. J. Little, the deeds are clearly voluntary, and hence void as to existing creditors, whether there was any fraudulent intent or not. If they were made with a fraudulent intent, they are also void as to subsequent creditors. It is not necessary that a fraudulent intent as to any particular subsequent creditor should be shown: a general fraudulent intent when the deeds were made will avoid them. As to subsequent creditors, fraud is inferred from a succession of similar voluntary conveyances, disproportionate to the grantor's ability; from the fact that he had to borrow the money to buy the lands so given and conveyed; and from his insolvency, or indebtedness to such an extent that the conveyances will have the necessary effect to hinder, delay, and defraud his creditors.—*Huggins v. Perrine*, 30 Ala. 398; *Williams v. Avery*, 38 Ala. 115; *Read v. Livingston*, 3 John. Ch. 481. When the grantor, or giver, subsequently obtains credit on the pretense that the property is his own, it is no longer a case of presumptive fraud merely, but positive proof of an original fraudulent intent; for the use made of the conveyances shows the intent with which they were made.—*Constantine v. Twelves*, 29 Ala. Whether voluntary conveyances from a father to his children are void as to subsequent creditors, depends on the intention with which they were made, to be gathered from all the circumstances of the case.—3 Porter, 198; 31 Ala. 186; 8 Conn. 186; 54 Maine, 476; 8 N. H. 44; 1 Md. Ch. 507; 21 Miss. 631; 28 Miss. 717; 17 Geo. 217; 34 Illinois, 382; 11 Missouri, 540; 6 U. S. Digest, 1st series, pp. 674–6, §§ 23, 75; 4 Dana, 251. A voluntary conveyance, made in contemplation of future indebtedness, is voidable at the instance of subsequent creditors.—1 Graves, Pa. Cas. 74. A deed, fraudulent as to existing creditors, is, as a general rule, fraudulent also as to subsequent creditors.—6 Mich. 456; 21 Miss. 348; 12 N. H. 396; 16 N. H. 464; 17 N. H. 417; 3 Wendell, 411; 6 Humph. 216; 11 Paige, 589; 23 Maine, 221.

The Hibler lands were bought before the war, though not conveyed until September 2, 1867; and the purchase-money was paid by J. J. Little. At that time, suits were pending against him, and debts are proved aggregating \$4,343, besides others not definitely known. Many of these debts are still due, and none have ever been paid in full. Ross was induced, by a false representation of Little's bankruptcy, to



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take \$300 in full payment of his debt; and Kirksey was induced by fraud to become Little's creditor for the debt to Ross, \$300, and the debts to Pierson and Woods, in all \$2,991.24, which are still due to him. On 9th April, 1868, when the first purchase was made from Reavis, there were debts due and unpaid, which swelled the total amount to \$8,319.24, besides others not specifically proved; and none of these debts appear to have been paid, except that due to Hargrove, which complainant was induced to pay; and he is still Little's creditor for that debt, besides the others above named, amounting in all to \$4,469.24. The purchase-money for this land was paid by J. J. Little, who borrowed it for that purpose. The same condition of things existed at the date of the purchase from Mary Beatty. In December, 1870, the time of the purchase from the estate of Rogers, the indebtedness had increased to more than \$12,000, and still continued to increase up to September 23, 1871, the date of the last purchase from Reavis; and of this large indebtedness, which has never been paid, the greater part is due to Kirksey. In all the cases, the purchase-money is shown to have been paid by J. J. Little, and the title taken in the names of his wife and children. As proving a general fraudulent intention in all these transactions, the complainants rely on the fact of large indebtedness, amounting to insolvency, and ever increasing; the manner in which, in each successive instance, the property was conveyed; the specific acts of fraud proved, by the representation of bankruptcy to Ross, and the exhibition of the tax assessment to Kirksey; and the fact that all the old debts were taken up, as far as possible, by the creation of new debts subsequent to the conveyances. As to these old debts, assumed by Kirksey, or Kirksey & Carpenter, and still due to the complainant, he is entitled to stand in the position of those prior creditors, and to be substituted to their rights.—Kerr on Fraud, 102, note; *Brown v. McDonald*, 1 Hill's Ch. 297; *Savage v. Murphy*, 34 N. Y. 508.

The defendants attempted to prove a separate estate in Mrs. Little. Of her distributive share of her father's estate, amounting to \$800, or \$1,000, it is shown that \$800 was paid by Little to the complainant. Of the sum said to have been given to her by her husband soon after the surrender, which the witness supposed was about \$6,000, but which he did not count, no satisfactory account is given. If this money was loaned out, or on deposit, it would have been easy to prove the fact; and it was incumbent on the defendants to make the proof, in explanation and rebuttal of the suspicious circumstances. If the money was on deposit, or hoarded, there



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could have been no inducement to pay the purchase-money to Hibler in installments, as is proved to have been done; nor could there have been any necessity for borrowing money to pay for these lands. The peculiar limitations contained in the different conveyances repel the idea that the purchases were made with money belonging to Mrs. Little's statutory separate estate. If the money was hers, the title ought to have been made directly and absolutely to her; and there is no law authorizing such limitations and conditions on her estate, materially changing its character. The limitations are perfectly consistent with the supposition of a gift from the husband, and an attempt on his part to reserve some benefit to himself; and they are not reconcilable with any other hypothesis. The proof shows how most of the purchase-money for the lands was procured by Little; and if Mrs. Little had \$6,000 at that time, whether loaned out, on deposit, or hoarded, there was the less necessity or propriety in her husband's making such provisions for her; and the fact raises a greater presumption against the validity of the conveyances.

SNEDECOR & COCKRELL, with THOS. B. WETMORE, *contra*.—The bills are not framed on the theory of tracing the debtor's funds, liable to the complainant's demand, into specific property, and subjecting it to the satisfaction of the debt. They proceed against the property conveyed, on the ground that the conveyances are voluntary, and the further ground that they are fraudulent. The defendants deny that the deeds are either fraudulent or voluntary; and they insist that, if voluntary, the complainant cannot set them aside on that ground. It is shown that Mrs. Little received about \$1,000 from her father's estate, \$800 of which sum was deposited by her husband with Kirksey & Carpenter; and it is an undisputed fact that, soon after the close of the war, she received a gift of at least \$6,000 from her husband, who was not at that time indebted to any body. These two amounts nearly equal the purchase-money paid for all the lands. Whether this identical money was paid for the lands, or was otherwise used by Little, is an immaterial inquiry: in either case, the conveyances are supported by a valid consideration.—*Coleman v. Smith*, at the last term. If the conveyances were wholly voluntary, they could only be set aside by existing creditors.—*Leonard v. Forcheimer*, 49 Ala. 145; *Marshall v. Croom*, 52 Ala. 554; *Crawford v. Kirksey*, at the last term. The first item in the plaintiff's account is a charge of \$1,000, under date of April 11, 1868; and the next, a credit of \$900, dated April 25, 1868; and on the 20th April,

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1869, when the last part of his crop of 1868 was sold, the balance against Little was merely nominal—only \$16.51. These dates are subsequent to the execution of three of the conveyances. As to these deeds, the question of their validity as voluntary conveyances is out of the case: they can only be set aside on the ground of actual fraud, or fraudulent intent.—Cases cited *supra*; also, *Loeschigh v. Hatfield*, 5 Robertson's (N. Y.) Rep. 26. If the deeds are not voluntary, proof of a fraudulent intent on the part of the debtor alone is not sufficient to invalidate them—there must be fraud in which the grantees participated; and of this there is no proof whatever. Nor does the evidence justify the inference of intentional fraud on the part of the debtor. The whole charge of fraud, in this connection, is based upon his supposed insolvency, or embarrassed condition, which is not supported by the evidence. All his business seems to have been transacted through Kirksey & Carpenter, and his credit with them seems to have been good. He was ruined, the witnesses say, by the purchase of the "Washington place," and the depreciation of values; and his insolvent estate, not yet settled, has already paid forty cents on the dollar.

STONE, J.—These three cases present, substantially, the same questions, and we will consider them together. The bills are in the form of creditors' bills, filed by the complainant, Kirksey, in behalf of himself and all other creditors of the estate of J. J. Little, who will make themselves parties, and contribute to the expense of the suit. No other creditors have come in, and Kirksey remains sole complainant. The *gravamen* of the bills is, that Little, the intestate, in his lifetime, being largely indebted to complainant and others, purchased several tracts of land, described in the bills, paid for them with his own money, and had the titles made to Sarah A. Little, his wife, without valuable consideration moving from her, and with intent to delay, hinder, and defraud his creditors.

Fraud that will vitiate a conveyance, and expose the property conveyed to the debts of the grantor, or of the person who pays the purchase-money, is of several classes. A conveyance of property on a consideration simply good, and not valuable, is voidable and inoperative against any debt the grantor may then owe; and this, without any reference to the innocence of the motive, or the present ability of the grantor to pay his debts from other sources.—*Miller v. Thompson*, 3 Por. 196; *Moore v. Spence*, 6 Ala. 506; *Stokes v. Jones*, 18 Ala. 734; 2 Brick. Dig. 21, § 100. A conveyance by gift, or on other consideration not deemed valuable in the law, is



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not, for that cause alone, rendered invalid as to subsequent creditors; and hence, while such conveyance will be set aside as to antecedent debts, it will be upheld as to subsequent debts. We have never followed the doctrine, that a conveyance, made without intentional fraud, by one indebted at the time, can be, on that ground, set aside by a subsequent creditor; or, if set aside by a prior creditor, let in a subsequent creditor to share in the proceeds. To do so, would be to obliterate the distinction between actual, or intentional fraud, and constructive fraud.—See *Corprew v. Arthur*, 15 Ala. 525; *Stiles v. Lightfoot*, 26 Ala. 443; *Spencer v. Godwin*, 30 Ala. 355; *Huggins v. Perrine*, 30 Ala. 396; *Gardner v. Booth*, 31 Ala. 186; *Cole v. Varner*, *Ib.* 244; *Pinkston v. McLemore*, *Ib.* 308. But conveyances made in actual fraud—with intent to delay, hinder, or defraud creditors—may be avoided by any creditor or purchaser, subsequent as well as antecedent.—*Williams v. Avery*, 38 Ala. 115; *Huggins v. Perrine*, *supra*. In *Crawford v. Kirksey*, at December term, 1876, we drew some distinctions between sales made by a failing or insolvent debtor in payment of a *bona fide* debt, and such sales when made upon a new consideration, presently paid. We need not repeat what we then said, as we do not consider that question directly presented by these records.—See *Hubbard v. Allen*, at this term.

Five deeds are brought to view in the present suits, and they are all assailed on two grounds: first, that the consideration in each case moved from J. J. Little, the intestate, and not from Sarah A. Little; and, second, that each and every one of the deeds was procured to be made to Mrs. Little, with intent to delay, hinder, and defraud the creditors of J. J. Little. The first and most important deed was made by Hibler and wife, and bears date September 2d, 1867. This deed, after being duly acknowledged and certified, was recorded in the probate office of the county, January 10th, 1868. The consideration of this sale was \$6,400, and the record is silent as to when it was paid. We infer it was paid before the deed was executed. The second deed averred to have been made, it is charged, bears date February 15, 1868, and was executed by Mary Beatty. This deed is not in the record, and it is neither averred nor proved when the consideration was paid, the amount of it, or value of the lot purchased. We infer this was paid for at or before the execution of the deed. We know not whether this deed was recorded. The third was executed by Reavis and wife—their first sale—and bears date April 9th, 1868; consideration, \$470 in gold, paid down at the purchase. This deed was not received for record, until October 4th, 1871. The



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bills charge that, when these deeds were executed, J. J. Little was largely indebted to complainant and others. The account and dealings between Little and Kirksey & Carpenter—now Kirksey—is made part of the testimony. It shows that the first item of indebtedness from the former to the latter was April 11th, 1868, "cash paid Stone & Matthews, \$1,000." On the 25th of the same month, \$900 of this was returned, or refunded. The next debit is May 6th, \$150; set off by a collection by Kirksey & Carpenter, for Little, of the same amount, two days before. On the 23d April, 1869, the account was made out and balanced between the parties, and the balance then against Little was only \$581.42, five hundred dollars of which was for an advance made that day. It is thus shown that, at the purchase of the three parcels of land above referred to, Little was not at all indebted to Kirksey & Carpenter; and so, as to these tracts, the relief claimed on the ground stated above must fail.

The other two conveyances, however, stand on a different footing. The deed of Thompson, administrator of Rogers, was executed December 19th, 1870; and the second deed from Reavis and wife bears date September 28th, 1871. There are circumstances tending to show that these purchases were probably made at an earlier date than these deeds show. But no reliable evidence is given, showing when the purchases were made, or the money paid. Hence we can not, with safety, assign to these transactions dates different from those shown in the deeds. Kirksey & Carpenter were large creditors of Little when each of these transactions was had, and their debt has never been paid. In January, 1870, the balance was over \$7,000. In April following, it was near \$5,000; and it steadily grew from that time until Little's death, in February, 1872. These purchases fall under the principle of conveyances made by or through a person who is indebted at the time, and cast on the grantee the necessity of proving a valuable consideration. The \$1,000 alleged to have been received from Mrs. Rogers, the distributive share of Mrs. Little in her father's estate, is the only item we deem it necessary to consider in this connection. Of that sum, Little received \$800 in draft of Mrs. Rogers, which went to complainant in this suit, March 4, 1869; immediately after it was drawn. When the remaining \$200 was received is not shown. Little paid Thompson, administrator of Rogers, the purchase-money for the property bought of him, by obtaining a loan from Chas. Hopkins & Co., October 18th, 1870. He paid Reavis, for the purchase from him, through Kirksey & Carpenter, in January, 1869, and in January, 1871. There is no testimony sufficiently

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explicit to connect either of these purchases with the \$1,000—Mrs. Little's distribution-money—and this line of the defense must fail.—See *Hubbard v. Allen*, at the present term; and *Hamilton v. Blackwell*, at present term.

The only remaining question we need discuss, is the charge in the bills that the several deeds were procured by Little to be made to Mrs. Little, with intent to delay, hinder, and defraud his creditors. We have above disposed of the question of the invalidity of the deeds of Thompson, administrator of Rogers, and of the second deed by Reavis and wife.

We have examined the mass of evidence in this record, with great care. All the testimony of Kirksey, the complainant, tending to prove transactions with, and statements by Little, the intestate, we feel bound to suppress.—Code of 1876, § 3058. So, there is much other testimony offered on each side, which is either hearsay, or opinion. We will not specify the evidence falling under these classes, but, in our deliberations, we will disregard it. Questions arising out of the form of interrogatories are abandoned by the agreement accompanying the submission. "Either party has the right to except to any part of the depositions offered, provided that such exception shall not be to such matter as would be remediable by retaking the deposition of the witness." Such is the substance of the agreement. We will take no note of objections, based on the leading form of the interrogatories.

As to the three deeds, bearing date September 2, 1867, February 15, 1868, and April 9, 1868, we think there is an entire absence of testimony that either of them was procured to be executed as they were, with intent to delay, hinder, or defraud any one, complainant or any other. The account with Little was opened by Kirksey & Carpenter after the last of those three deeds was executed, and more than a year after this the balance against Little was only \$581. The main deed—that which conveyed property costing \$6,400—had then been recorded in the probate office of the county for more than a year. And up to the death of Mr. Little, near three years later, Kirksey & Carpenter still credited Little more liberally than they had done before. And when they took a mortgage from Little to secure themselves, they took it on other lands than those conveyed to Mrs. Little. A still more pregnant circumstance is found in the fact, that although, in each of the three bills, it is charged that the deeds were thus made to defraud Kirksey & Carpenter, yet they neither aver nor prove that, at the time they so gave credit to Little, they had not knowledge that said deeds had been made to Mrs. Little. The bills, as to the three tracts

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of land first purchased, must fail, under the rules we have declared above.

In case 249, the decree of the chancellor is affirmed.

In case 250, the decree of the chancellor is reversed, and a decree here rendered, granting to complainant relief as to the lands purchased from Thompson, administrator of Rogers, and denying it as to lands purchased from Mary Beatty. All other questions are reserved for decision by the chancellor.

In case 251, the decree of the chancellor is reversed, and a decree here rendered, granting relief to complainant, and declaring the lands therein described are subject to his claim. All other questions are reserved for decision by the chancellor.

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*Bill in Equity by Creditors of Insolvent Estate, against Executor and Purchasers, alleging Waste and Devastavit, and seeking to enforce Vendor's Lien on Land.*

1. *Sale of lands by executor, under power, for payment of debts, and for distribution.* A will contained these clauses: "In the first place, I desire and will that my executors, or administrators, shall pay off all my debts, of every kind and nature; and if necessary to effect this, I will them to sell as much of my property as may be sufficient to do the same. Then, I wish, and hereby authorize them, to sell at public auction, on a credit of one, two, and three years, all my property of every kind, real and personal; purchasers to give notes, with two or more approved securities, bearing interest from date;" and the proceeds of sale, when collected, after setting aside a specified sum to be invested for the benefit of the widow during her life, were to be distributed among his children: *Held*, that the power to sell for the payment of debts was distinct from the power to sell for distribution, &c., and was not subject to the same directions as to terms; and that, the terms of sale, when made for the payment of debts, being discretionary with the executor, it was not essential to its validity that security should be required from a solvent purchaser.

2. *Executor's power over choses in action; devastavit, and who is chargeable with.* An executor or administrator, notwithstanding his large discretionary power over the choses in action in his hands for administration, can not apply them in payment of his individual debts, without committing a *devastavit*, for which the person who receives them, having notice of his abuse of authority, is answerable; but this principle does not apply to a debt for which, although the executor was the principal debtor, the testator was also bound as his surety.

3. *Notice of protest.*—Notice of the protest of a bill of exchange, deposited in the post-office of the city or town in which the indorser resides, and in which the bill is payable and protested, is sufficient to charge him, unless it is shown that the holder also resided there.

4. *Transfer of note by executor; payment to him in Confederate treasury-notes.* An executor, or administrator, has power to transfer a promissory note, assets of the estate, in payment of a debt due from the decedent; and it was also within

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| 60 | 901 |
| 68 | 225 |
| 73 | 460 |
| 84 | 341 |



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his power, having sold property of the estate during the late war, to receive payment of the purchaser's note, before its maturity, in treasury-notes of the Confederate States.

5. *Insolvent estate; contribution between creditors.*—A creditor of an insolvent estate, whose claim has accrued since the distribution of the assets, or whose disabilities have been since removed, may recover his *pro-rata* share of the assets from another creditor, who has received, through the decree of the court, a greater dividend than he would have been entitled to receive if the plaintiff's claim had been included with the other debts (Code of 1876, § 2585); but the statute does not apply to a creditor who has been paid in full by the personal representative before the estate was reported or declared insolvent.

6. *Cross-bill.*—When a bill is filed by creditors of a decedent's estate, which has been declared insolvent, against the personal representative, and against persons who have purchased the lands from him, charging a *devastavit* by them, and seeking to have the lands sold for the payment of the purchase-money alleged to be unpaid; the widow, being made a defendant as a legatee under the will, can not maintain a cross-bill for an assignment of dower in the lands.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The original bill in this case was filed on the 7th September, 1871, by John C. Shelton, as a creditor of the estate of Willis Crenshaw, deceased, on behalf of himself and the other creditors of said estate, or so many of them as might come in and contribute to the expenses of the suit, against John N. Carpenter individually, and as executor of the last will and testament of said Willis Crenshaw; and against the widow and children of said Crenshaw, as legatees under his will; and against the administrator and heirs-at-law of Duncan Dew, deceased, who had purchased some of the lands belonging to said Crenshaw's estate, from the said executor; and against John P. Pippin and W. H. Pippin, who had also purchased some of said lands from said executor; and against Thomas Dougherty, as a sub-purchaser from said Pippin. It sought to charge said executor with waste and *devastavit*, in the management of the said estate, particularly in the matter of the sale of lands to said Dew and Pippin, to hold them accountable as having knowingly participated in such *devastavit* and subject the lands to sale for the payment of the purchase-money.

Willis Crenshaw, the testator, died in said county of Greene, the place of his residence, in August, 1862; and his last will and testament was there duly admitted to probate, in September, 1862, and letters testamentary thereon granted to said John N. Carpenter, one of the persons therein named as executor. Said will, a copy of which was made an exhibit to the bill, contained the following provisions. "In the first place, I desire and will that my executors, or administrators, shall pay off all my debts, of every kind and nature; and if necessary to effect this, I wish them to sell as much

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of my property as may be sufficient to do the same. Then, I will, and hereby authorize them, to sell at public auction, on a credit of one, two, and three years, all my property of every kind, real and personal; purchasers to give notes, with two or more approved securities, bearing interest from date. After disposing of all my property, in the above manner, I will that my executors, or administrators, for the benefit of my wife Amanda, set aside the sum of \$5,000, to be placed at interest, well secured; the interest of which sum is to be applied annually to her support and maintenance; and at her death, the said sum of \$5,000 is to revert back to my estate. And as I have heretofore given off to John N. Carpenter and my daughter, Amelia R. Carpenter, his wife, the sum of \$8,000, I will that each of my heirs draw the same amount from my estate, so as to place them all on an equality; and then I will that the balance of my estate be divided equally among all my heirs, share and share alike. And I hereby appoint John N. Carpenter and Anderson Crenshaw, my son, my executors or administrators, without requiring them to give bond; and also constitute and appoint John N. Carpenter and Anderson Crenshaw guardians to my minor children."

At the time of his death, the said testator owned two plantations in said county, or tracts of land, a large number of slaves, a residence in the town of Eutaw, and other property, the aggregate value of which was between \$120,000 and \$150,000. Mrs. Amanda Crenshaw, his wife, was at that time insane, and had been for many years, and was confined in a lunatic asylum; and she continued in that condition up to the filing of the bill in this case. On the 22d December, 1862, said executor sold the lands, after due advertisement, at public auction, on a credit of one, two, and three years, with interest; Duncan Dew becoming the purchaser of one tract, and John P. and W. H. Pippin of the other tract; each executing their notes for the purchase-money, in accordance with the terms of the sale, and being put in possession by the executor of the lands bought by them respectively. At the time of the sale, or prior thereto, Dew asked the executor, if the purchase-money could be paid in debts against the testator; and the executor answered, that payment could be made in that way. The land bought by Dew, at \$11.10 per acre, aggregated \$14,980; and that bought by Pippins, at \$6.00 per acre, aggregated \$2,700. The sale was reported by the executor to the Probate Court, on the 19th January, 1863, as having been made by him "in pursuance, and by direction of said will;" but the report does not state for what purpose the sale was made. In payment of Dew's first note, before its maturity, he surrendered to the executor three claims



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which he held against the testator's estate : 1st, a note, or due-bill, which, with interest, amounted to \$112.66: 2d, a draft for \$1,138.29, drawn by the testator on said John N. Carpenter, and by him accepted; and, 3d, a draft for \$3,718.25, drawn by said Carpenter on Thos. H. Herndon, payable to said testator, and accepted by Herndon for his accommodation. In payment of the second note, he assumed a debt (or a part thereof) which the testator owed one Gowdy, or Gowdry, and which he paid in Confederate money; and he paid the third note to the executor, also before maturity, in Confederate treasury-notes. Pippin's first note was transferred by the executor to one Perkins, at its face value, in payment of a debt which he held against the estate, for the same amount; and it was paid to said Perkins, after the close of the war, in United States currency. The second and third notes of Pippins were paid to the executor, before their maturity, in Confederate treasury-notes, which he used in paying debts against the estate. The slaves were never sold, but were emancipated by the result of the war.

The testator's estate was declared insolvent on the 13th August, 1866. John C. Shelton, the complainant in the suit, who resided in Fredricksburg, Virginia, filed as a claim against the estate a promissory note for over \$6,000, given by the testator on the 21st January, 1862, for money loaned before that time; on which note an action had been commenced against the executor, and a judgment was obtained on the 18th April, 1867, for over \$8,000. The bill alleged that the estate was not in fact insolvent, or was rendered insolvent by the waste and *devastavit* of the executor, in which said Duncan Dew and Pippins knowingly participated, and that said executor was insolvent; and prayed that an account of the debts might be taken, and that the lands might be sold for the payment of the purchase-money, and for general relief. Answers were filed by Pippins, Dougherty, and the representatives of Dew, denying the charges of fraud and collusion, and insisting on the validity of their purchases of the lands; and a cross-bill was filed in the name of the widow, asserting her right of dower in the lands, and asking that it might be allotted to her. A demurrer to the cross-bill was filed by the complainant in the original bill, and by the other defendants, but was overruled by the chancellor, who held that, under the facts above stated, the court would elect for the widow, she being still a lunatic, to dissent from her husband's will, and claim dower in the lands, or compensation in lieu of dower, to be paid out of the unadministered assets. He also held, on final hearing on pleadings and proof, that the complainant was not entitled to any re-



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lief against Duncan Dew's estate, or the lands purchased by him at the executor's sale, because the purchase-money went in extinguishment of the debts of the estate to an equal amount, and therefore the estate was not injured by the transactions between said Dew and the executor; but, as against John P. and W. H. Pippins, and the lands bought by them, including the portion which they had sold Dougherty, the lands were subjected to the vendor's lien on account of the last note, which was paid before maturity in Confederate money; and he rendered a decree accordingly.

From this decree the complainant now appeals, and here assigns as error the overruling of his demurrer to the cross-bill, the decree rendered on the cross-bill, and the dismissal of his bill as against the personal representative and heirs of Duncan Dew. By consent, there is a cross-assignment of errors on the record by John P. and W. H. Pippins, presenting the correctness of that part of the decree which granted relief against them.

R. H., R. I. & G. L. SMITH, for the appellant Shelton.—1. The complainant is a creditor of Crenshaw's estate; his debt is not barred, and he has received nothing on it. Dew also was a creditor, and he has received payment of his debt in full. On these facts, aside from any other aspect of the case, the statute gives the complainant a right of action against Dew, if Crenshaw's estate is solvent.—Code of 1876, § 2585. The whole amount of the debts did not exceed \$35,000; Dew's is claimed to have been \$4,969.20, and the complainant's is \$8,110.89; hence, he is entitled to recover of Dew, at least, \$1,550.

2. An executor cannot set off a debt due to him as executor against a debt due from his testator. The statute expressly declares that the debts must be mutual—that is, they must be strictly between the same parties.—*Rapier v. Holland*, Minor, 176; 1 *Stewart*, 529; *Swilley & Riley v. Lyon & Baker*, 18 Ala. 559; *McKinley v. Winston*, 19 Ala. 301; *White v. Word's Adm'r*, 22 Ala. 444; *Fry v. Evans*, 8 *Wendell*, 530. This principle shows the illegality of the transaction, by which the executor received the draft for \$3,718.25, not then due, in part payment of Dew's first note, and allowed him to assume a part of the debt to Gowdy in payment of his second note, also before its maturity; and the relations of Dew to the estate, to the extent of these two items, together amounting to \$8,687.45, are the same as if these transactions had never taken place. Dew was bound to know that the transaction as to the Gowdy debt was illegal, and can claim no advantage from it.

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3. Dew's third note was not payable until December, 1865, and was payable in funds current at its maturity; and the executor had no authority to receive payment, before its maturity, in currency which was valueless. The executor sold the lands under the will, and he had no authority to sell on any other terms; and Dew was bound to know this fact. This note, then, stands as if it had never been paid at all. The same principle applies to the note of Pippins last falling due, as to which the chancellor rightly ruled that, as against the estate, it had never been paid.

4. But the two larger drafts used by Dew in payment of the first note, amounting to \$4,856.54, were in fact the debts of Carpenter, the executor, and not of Crenshaw, his testator. That the acceptor of a draft is the party primarily liable, see Story on Bills, § 325; *Inge v. Br. Bank at Mobile*, 8 Porter, 108. It is presumptive evidence of a debt due from the acceptor to the drawer; and the acceptor must remove this presumption, and show that he accepted for the accommodation only of the drawer, before he can recover against the latter. This has not been done, and the draft stands as the debt of Carpenter, the acceptor; and the presumption of law is strengthened by the fact that Carpenter was the commission-merchant of Crenshaw. The other draft, of which Herndon was accommodation acceptor, stands on the same ground, as between Carpenter and Crenshaw. These drafts being the individual debts of the executor, he could not pay them with the assets of the estate; and the person receiving such payments from him, with the knowledge of the misapplication, is equally with him liable for the *devastavit*.—2 Williams on Executors, 1630, note; *McLeod v. Drummond*, 17 Vesey, 167; *Rogers v. Fort*, 19 Geo. 96; *Hargrove v. Batty*, 19 Geo. 132; *Brush v. Ware*, 15 Peters, 93.

5. It is no answer to these propositions to say, that the insolvency of the estate was caused by the emancipation of slaves, which was the result of the war, and for which the executor is not responsible. It was the duty of the executor to sell the slaves for the payment of the debts, before proceeding to sell the lands; and in first selling the lands, he was guilty of a breach of duty and a *devastavit*.—Rev. Code, §§ 2079, 2084; 2 Wms. Ex'rs, 1630; 4 Bacon's Abr. 100. If he had executed the trust according to the law and the terms of the will, the slaves would have been sold, instead of perishing on his hands, the debts would all have been paid, and the estate would have been solvent. Moreover, Dew's debts were paid by the executor shortly after the probate of the will, instead of waiting eighteen months for the presentation



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of claims; and this renders him liable as for a *devastavit*. 15 Peters, 93, *supra*.

6. The demurrer to the cross-bill ought to have been sustained. The claim set up in it had no connection with the original suit. The widow had no claim to dower, on account of the provision made for her by the will.—*McLeod v. McDonnell*, 6 Ala. 243; *Hilliard v. Binford*, 10 Ala. 991; *Collins v. Carman*, 5 Md. 535; 2 Scribner on Dower, 473. She did not dissent from the will, and, being insane, could not; and the right to dissent is personal, and cannot be exercised for her by the court. If entitled to dower, it was in the lands, and not out of the estate.

W. & J. WEBB, and JOHN T. TAYLOR, for the administrator and heirs of Duncan Dew, deceased.—1. The bill is not framed to set aside the sale of the lands by the executor, and to have them sold to pay the claims of creditors; but, conceding and asserting the validity of that sale, it seeks to re-sell the lands for the payment of the purchase-money. The material question, if not the only one, so far as the personal representative and heirs of Dew are concerned, is as to the validity of the payment and settlement of his notes as against the complainant. The sale was made by the executor for the payment of debts, and his discretion as to terms, &c., was not restricted or limited in any manner by the will. It was part of the contract between him and Dew, that debts against the estate would be received in payment; and there could be no objection to this arrangement, since it carried out the very purpose for which the sale was made. The agreement being a part of the contract, it cannot be repudiated, while affirming the validity of the sale: the whole contract is either good or bad, and must be affirmed or repudiated as a whole.—*Crawford v. Barkley*, 18 Ala. 270; Story on Agency, §§ 250-53; 28 New York, 239; Story on Conflict of Laws, §§ 317, 332. The notes for the purchase-money were payable to the executor, and were assets in his hands. He was the only person authorized to settle, receive payment, or give discharges for them, or any other *choses in action* in his hands; and a payment to him was an extinguishment of the debt, in the absence of fraud, or collusion, between him and the debtor. The charge of fraud and collusion being unsupported by the evidence, the validity of the payments cannot be questioned.—*Waring v. Lewis*, 53 Ala. 615; *Beattie v. Abercrombie*, 18 Ala. 18; 2 Williams on Executors, 805, 807, 810, note c; 14 Wendell, 90; 4 Hill, 492; Perry on Trusts, 457, § 511. In order to perform his duty in paying debts, an executor or administrator must sell



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property in many instances ; and no one would deal with him, if liable afterward to be called to account, for subsequent events and acts, over which he had no control.—2 Williams on Executors, 796, 798, note 1 ; Hill on Trusts, 342 ; 3 Mason, 218 ; 13 Pick. 397.

2. None of the objections to the transactions between Dew and the executor can be sustained. That the effect was to pay Dew's debts in full, does not prevent the extinguishment of these debts, or affect the validity of the transaction, though the executor could only claim, on the future insolvency of the estate, a credit for the proper *pro rata*.—*McNeill v. McNeill*, 36 Ala. 109 ; *Bates v. Vary*, 40 Ala. 437 ; *Prater's Adm'r v. Stinson*, 26 Ala. 456. The payment in Confederate money is immaterial. The sale was not made under an order of court, and is not governed by the principle applicable to judicial sales.—44 Ala. 91 ; 46 Ala. 598 ; 8 Wallace, 14 ; 14 Wallace, 661 ; 66 N. C. 590. It must be remembered, too, that the sale was made in 1862, when Confederate money was the only currency ; and that the money so received was used in paying debts against the estate to an equal amount. That the last notes were collected before they were due, is equally immaterial. The notes bore interest from date, which was equivalent to a sale for cash ; and the money was applied in payment of debts. The intent and purpose of the power of sale having been accomplished, equity will not scrutinize the mode and manner in which it was done.—*Story's Equity*, § 174.

3. As to the draft for \$3,375, the notice of protest, sent through the post-office, was sufficient, since it is not shown that the holder also resided in Eutaw.—*Bibb v. McQueen*, 42 Ala. 408 ; 43 Ala. 455. As it was in fact Crenshaw's debt, he was not entitled to notice.—*Evans v. Norris, Stodder & Co.*, 1 Ala. 511.

4. When the testator died, in 1862, his estate was entirely solvent, though he owed some debts ; but the war was then raging, and on its results depended the value of property, and the solvency of estates and individuals. Dew and Shelton each held debts against the estate. In view of the uncertainties of the future, Dew chose to take the lands in payment of his debt, though at an increased price. Shelton declined to do so, refused to receive Confederate money, took no steps to protect himself, and awaited the course of events. He can not now complain of the consequences of his own laches.—40 Ala. 442 ; 41 Ala. 700 ; 45 Ala. 205.

W. COLEMAN, for John P. Pippin and W. H. Pippin.—In the absence of any will, an administrator has the right to

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settle, receive payment, discharge, or dispose of the *choses in action* in his hands; and any transaction with him, as to them, can only be avoided on the ground of fraud or collusion.—*Woolfork's Adm'r v. Sullivan*, 23 Ala. 548; *Waring v. Lewis*, 53 Ala. 615; *Jones v. Blalock*, 31 Ala. 183; 7 John. Ch. 154; 4 Hill, N. Y. 507. Here, the executor, in addition to his general powers, was authorized and required, by the terms of the will, to sell the property, and to pay the debts of the estate; and he exercised the power in good faith, and with great discretion. The money collected from the purchasers was used in paying the debts, as the testator contemplated and directed; and they cannot now be held responsible, on account of results brought about by subsequent events, with which they had no connection.

E. MORGAN, for John N. Carpenter, the executor.—The charge of fraud against the executor, and of collusion between him and the purchasers at his sale, was necessary to give equity to the bill, and seems to have been inserted for that purpose; but it is entirely unsupported by any evidence. A complete answer to the charge, if any answer is needed, is found in the fact, shown by the testimony, that the executor was personally absent, being in the army during the whole war, and did everything through his agent and attorney, to whom his business was intrusted. Results have justified the wisdom with which the estate was managed, and its present condition is caused solely by the results of the war. In the payment of debts, no discretion was left to the executor: the duty was imposed on him, to sell the property, and pay the debts; and he performed that duty in good faith, and for the benefit of all parties interested in the estate. If the complainant was not paid, it is because he would not receive Confederate money. Whatever may be his rights or remedies against other creditors, he can not complain of the executor, who has fully accounted for all assets that came to his hands.

E. MORGAN, and W. & J. WEBB, for Mrs. Amanda Crenshaw, the testator's widow, argued the several questions presented by her cross-bill, as to her right of dower in the lands, and the power of the court to elect for her; questions not decided by the court.

BRICKELL, C. J.—The power of the executor to sell for the payment of debts, is distinct from, and must not be confounded with, the power to sell for the purpose of raising an interest-bearing fund for the benefit of Mrs. Crenshaw,

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during her life, and for the purpose of making a distribution according to the terms of the will. The powers are intended for wholly distinct purposes, and are expressed in different terms. The first is general—to sell any part of the estate of the testator; and the terms of the sale, whether for cash, or on credit, or, if on credit, the time of credit, and whether security shall be taken from the purchaser, and the character of the security, are committed to the discretion of the executor. The debts of the testator having been paid, power is then conferred to sell all the property remaining, on a credit of one, two, and three years, taking notes from the purchasers, bearing interest, with two sureties. The lands were sold by the executor, for the payment of debts, under the first power; and it is not an objection to the validity of the purchase by Dew, that surety was not required and taken on his notes for the purchase-money. The executor was not bound to take such surety, or to any form of sale. His authority was as full and complete as that of the testator himself; and his duty was, for the discharge of which in good faith and with reasonable diligence he was responsible, to obtain a fair and full price, securing payment of the purchase-money. Dew's solvency may have been, and we may say was certainly, so unquestionable, that it would have been a mere form, or idle ceremony, to have demanded surety of him. The matter of taking surety rested in the discretion of the executor—it was not imposed as a condition on which the power of sale should be exercised, and the validity of the sale is not affected, because surety was not taken on Dew's notes.—*Huger v. Huger*, 9 Rich. Eq. 217.

2. The facts relied on to avoid the payment of the notes by Dew to the executor, are these: The lands were sold on a credit of one, two, and three years, for equal annual installments, with interest from the day of sale. The first installment was paid with the claims which Dew held against the testator, two of which were bills of exchange drawn by the executor, and indorsed by the testator. There is some evidence which tends to show that the bills were drawn for the accommodation of the testator, and that he was in fact the primary debtor; but we do not regard it as sufficient to overcome the presumption arising from the paper. One of these bills wanted a few days of maturity, at the time of the settlement of the first installment between Dew and the executor, and the other had been protested some months previously. The second note, or installment, was paid to a creditor of the testator, to whom the executor had transferred the note. The third was paid, before its maturity, in Confederate treasury-notes. It is insisted that the two bills of exchange



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were the debts of the executor, which he had no authority to receive in payment of the purchase-money, and that receiving them was a *devastavit*, in which Dew participated, and for which he is responsible.

While the power of an executor, or administrator, over the *choses in action* in his hands for administration, is of necessity large, and he may be dealt with generally as if he was the owner of them, he is without authority to apply them in payment of his individual debts. Whoever accepts them as security for, or in payment of such debts, has full notice of the abuse of his fiduciary power and duty, and must be answerable for them.—*Swoope v. Trotter*, 4 Port. 27; *Waring v. Lewis*, 53 Ala. 615; *Van Hoose v. Bush*, 54 Ala. 342. The bill which had reached maturity, though the executor was the principal debtor, was also the debt of the testator; and it cannot, with any propriety, be said that Dew was receiving, or the executor applying the assets, in payment of his own debt, so far as that bill is concerned. The principle to which we have adverted applies, only when the assets are employed to pay debts of the executor, with which the testator is not chargeable, and for which the assets are not bound.

3. The bill which had matured, it is said, was not a debt against the testator, because he had not been duly notified of its protest for non-payment. Notice of dishonor, or a reasonable excuse for its absence, is necessary to fix the liability of an indorser of a bill of exchange. The notice of dishonor was given the testator, by depositing it in the post-office at Eutaw, the place of his residence, and the place of payment and protest of the bill. The notice was sufficient, unless it had been shown that Dew, the holder, resided in Eutaw, a fact of which there is no evidence.—*Carson v. State Bank*, 4 Ala. 148; *Bibb v. McQueen*, 42 Ala. 408. The liability of the testator having been fixed by protest and notice, Dew could have compelled payment from the executor, and the payment was a proper application of the assets, and in no sense a *devastavit*.

4. The executor had power to assign and transfer the second note to Gowdry, a creditor of the testator; and it certainly is not a fact with which the appellant has any concern, whether Dew paid it in Confederate treasury-notes or in gold and silver. It was also within the power of the executor to receive Confederate treasury-notes, in payment of the note last due, even before its maturity.—*Van Hoose v. Bush*, *supra*.

5. The appellant insists, that the estate being insolvent, and Dew having received his debts in full, he has a right to

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recover of him such portion as would have been applied to his debts, if the money had been paid to the executor, and had remained in his hands for distribution to the creditors. The right is supposed to be conferred by the statute (Code of 1876, § 2585), which authorizes a creditor of an insolvent estate, whose claim is not barred, to recover of any person who has received any dividend of such estate, such an amount of the dividend as will be in the same proportion his claim bears to the debts of the estate. The statute is a part of the system defining the mode of ascertaining the insolvency of the estates of decedents, the ascertainment of the claims of creditors, the distribution to them of the assets, and the final settlement and discharge of the administrator or executor. It is required that all claims shall be filed in the Court of Probate, within nine months after the declaration of insolvency, or after the same accrue, or they are forever barred. There is a saving in favor of infants, and persons of unsound mind, who are allowed nine months after the removal of their disabilities to file claims.—Code of 1876, §§ 2568-69.

When an estate is decreed insolvent, exclusive jurisdiction of all claims against the decedent is transferred to the Court of Probate, and they cease to be the subject of a suit, at law or in equity, against the personal representative. He is without authority to pay any creditor, nor can he, by any acknowledgment or admission, relieve the creditor from the bar the statute creates, if he fails for nine months by filing his claim to commit it to the exclusive jurisdiction of the Court of Probate. The distribution of the assets to creditors is through the decree of the court, and when the personal representative, in obedience to the decree, applies them, he is discharged from liability. There are claims, which the statute does not bar, though not filed: claims which do not accrue until the bar is complete, and claims in favor of infants and persons of unsound mind. The purpose of the provision of the statute, on which the appellant relies, is, that these creditors, having filed their claims within nine months after their accrual, or the removal of their disabilities, shall receive their just proportion of the assets. Of the personal representative, there can be no recovery; for he has applied the assets under a decree of a court of competent jurisdiction, and in obedience to the statute. The recovery is from creditors who have received dividends under the decree of the court. The statute does not authorize a recovery from a creditor to whom the personal representative, having full and complete power to pay debts, and who, as to creditors, is presumed to know how much he can safely

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pay, has paid more of the assets than the condition of the estate justified. For such payments, in excess of the assets, he is responsible to other creditors; or, rather, he can claim only to be substituted to the place of such creditors, and take the share of the assets it may be ascertained can be properly applied to the payment of such debts.—*McNeill v. McNeill*, 36 Ala. 109; *Hearrin v. Savage*, 16 Ala. 286.

The decree of the chancellor, dismissing the bill as to the personal representatives and heirs-at-law of Dew, must be affirmed.

The payment by Pippin to the executor, of the notes he gave for the purchase-money of the lands, was not, as the chancellor decreed, invalid. There was no want of power in the executor to accept Confederate treasury-notes in payment; and it was on this ground, and not because of any evidence of a want of good faith in the purchaser or the executor, the chancellor proceeded in rendering the decree.—*Van Hoose v. Bush*, 54 Ala. 342. The decree against John Pippin, William Pippin, and Thomas Dougherty, must be reversed on the cross-assignment of errors by them, and a decree here rendered dismissing the bill as to them.

6. The cross-bill of Mrs. Crenshaw, claiming an assignment of dower, should not have been entertained. She is not a party to the original suit, in any other capacity than as a legatee under the will of her husband. There is no antagonism between her claim to be endowed of the lands of her deceased husband, and the rights asserted by the complainant as a creditor. If she is entitled to dower, it is a right to be asserted against the personal representative, the heirs, or devisees, and the purchasers of the lands; and may be asserted without any diminution of the rights of the complainant, or any other creditor. The dower interest in the lands was not sold or conveyed by the personal representative, nor had he authority to sell and convey it; and compensation for it cannot be claimed from the assets in his hands.—*Williamson v. Mason*, 23 Ala. 488-504. A cross-bill can be entertained, only on matter growing out of the original bill, and not on rights or equities which have no connection with, and are independent and distinct from it.—3 Dan. Ch. Pr. 1742; *Nelson v. Dunn*, 15 Ala. 513. We intimate no opinion as to her right to dower, as the question does not properly arise in the cause. The decree on the cross-bill must be reversed, and a decree will be here rendered dismissing it at the costs of the next friend therein.

The appellant Shelton must pay the costs of the appeal by Pippin and others, and one-half of the costs of his own appeal; the other half will be paid by the next friend of Mrs.



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Crenshaw. The cause must be remanded to the Chancery Court of Greene.

## Lavender v. Hall.

### *Action for Damages by Landlord, against Person removing Crop.*

1. *Action on the case; when landlord may maintain, against person removing crop.*—A landlord may maintain a special action on the case, against a stranger who, having notice of his statutory lien for rent (Code of 1876 § 3467), carries away the crop from the leased premises, and appropriates it to his own use, whereby the landlord loses his rent; and it is no defense to such action, vindictive damages not being claimed, that the defendant did not intend to injure the landlord.

2. *Statute of frauds; executed and executory contracts.*—The statute of frauds, requiring certain contracts to be reduced to writing (Code of 1876, § 2121), applies only to executory contracts; and if the parties to a verbal contract have voluntarily executed it, a stranger can not be heard to question its validity under the statute.

3. *Declarations of third person, not part of res gestæ, nor explanatory of possession.*—The declaration of the sub-tenant from whom the defendant obtained the cotton, made at the time of delivering it, to the effect that it was not raised on the land rented from plaintiff, is not competent evidence for the defendant.

### APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

This action was brought by R. F. Hall, against William H. Lavender, and was commenced on the 28th January, 1874. The complaint contained but a single count, which averred that, on the 18th October, 1872, the plaintiff leased a certain tract of land to one Carney Crenshaw, for and during the year 1873, for a stipulated rent, payable in cotton; that said Crenshaw failed to pay the rent, or to comply with the stipulations of the contract on his part, and was and is insolvent; that the defendant, "well knowing the premises, and intending to deprive plaintiff of his statutory lien for the rent of said land," on or about the 13th November, 1873, by means unknown to plaintiff, got possession of a large quantity of cotton raised on the lands that year, worth \$500, and converted the same to his own use; wherefore plaintiff claims damages, &c. The defendant pleaded, 1st, not guilty; and, 2d, the statute of frauds, averring that the contract between plaintiff and said Carney Crenshaw was not reduced to writing, signed, &c., as required by that statute; and issue was joined on both of these pleas.

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On the trial, as the bill of exceptions states, the plaintiff offered in evidence the contract between himself and Carney Crenshaw, "of which the following is an exact copy, all of it being on one side of a half-sheet of paper."

"Tolson Place, October 8th, 1872."

"On or before the 1st day of November next, I promise to pay & deliver to R. F. Hall at the depot (8) *bails* good cotton, weighing (500) lbs. each, and *bild* a gin-house & screw on the place during the year 1873, or pay (10) *bails* good cotton for the rent of said place for year 1873.

"Witness by R. F. Hall. his  
CARNEY X CRENSHAW.  
mark.

"And the said Hall is to furnish 130 lbs. nails, and plank to *flower* said gin-house and *wether bord* it up at the ends and sides; that is, said Hall is to pay for the plank and nails. And the undersigned is to have the place (3) years after *bilding* the gin-house, at (8) bails a year, provided *they* pay the rent each year. This October 8th, 1872.

"Witnessed by S. A. Hall. R. F. HALL."

The plaintiff testified, as a witness for himself, "that Carney Crenshaw made his mark to this instrument in his presence, being the same person named therein as payee, and that he wrote his own name thereto as a subscribing witness to said mark." The court allowed the instrument to be read in evidence to the jury, against the objection of the defendant, and he excepted. It was shown that Carney Crenshaw, who died before the trial, employed four squads of laborers in cultivating the land; and defendant, at the request of said Carney, made advances to most of these laborers during the year. Frank Crenshaw, a son of Carney, was the head of one of the squads, and cultivated, in addition to some of the land leased from plaintiff, about twenty-five or thirty acres on an adjoining plantation. All the cotton raised by Frank Crenshaw and his squad was carried up to his house, and there put in a pen. The defendant came to the place, in October, or November, with his wagon, and Frank Crenshaw delivered to him all the cotton then in the pen, and he hauled it away. The defendant testified that, when he took away the cotton, he did not know that any of it had been raised on the "Tolson place;" that he did not know that plaintiff had any claim to it, until they met in the public road some time afterwards, when plaintiff demanded the cotton of him, and showed him the contract with Carney Crenshaw; and that he then told plaintiff the contract was worthless, and that, "if

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he got anything out of him, he would have to get it by law." During the examination of the defendant as a witness, his counsel asked him, "What, if anything, did Frank Crenshaw tell you about said cotton in the pen, as to where it was raised, at the time he delivered it to you?" The court sustained an objection to this question, and would not allow it to be asked; to which ruling, also, the defendant excepted.

The defendant requested the following charges, which were in writing: 1. "That, if the jury believe, from the evidence, that he had no intention of depriving plaintiff of his rent, or of injuring his lien as landlord for said rent, but was informed and believed that plaintiff's rent was only four bales of cotton, and that fully that much cotton had been reserved for its payment, then their verdict must be for the defendant." 2. That the defendant can not be held liable in this action, for selling or appropriating to his own use cotton raised on the 'Tolson place' during the year 1873, unless the evidence satisfies the jury that he knew the cotton was so raised on said place, and that he knew, before he sold it, that it would be necessary to be applied to pay plaintiff's lien for rent." The court refused each of these charges, and the defendant excepted to their refusal.

All the rulings of the court to which, as above stated, exceptions were reserved by defendant, are now assigned as error.

JAS. E. WEBB, for appellant.

GARRETT & WALKER, *contra*.

MANNING, J.—Hall, by an agreement with one Carney Crenshaw, leased tillable land to the latter, in October, 1872, for and during the year 1873; for which Crenshaw was to pay, as rent, ten bales of cotton, unless he should put up a gin-house and screw on the premises, during that year; which if he should do, he was to pay for rent only eight bales of cotton for said year 1873. He was likewise to have the land for the like rent of eight bales a year, for three years more, if punctual in paying the rent. This agreement was reduced to writing, which set forth, in the beginning of it, the contract for the year 1873; to which was signed the name of Carney Crenshaw, and a cross mark between the words "his mark," and also the name of plaintiff, Hall, as subscribing witness thereto. The writing was then continued on the same half-sheet of paper, and set forth the contract on the part of Hall to furnish nails and plank for the flooring and weatherboarding of the gin-house, and to renew the lease of the



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land, for three years more, on the terms above mentioned; and this part was signed by Hall, and attested by S. A. Hall.

Carney Crenshaw had the land cultivated during the year 1873, by four squads of hands; for three of which appellant, Lavender, made advances during the same time, for which he was entitled to be paid. Of one of these squads of laborers, Frank Crenshaw, son of Carney, was the foreman; and from him Lavender got some of the cotton made by his squad, to be appropriated to payment for the advances he had made. Hall, the landlord, to whom three bales of cotton were still due for the rent of 1873, demanded them of Lavender, who refused to surrender any of the cotton he had received, but sold and disposed of it for his own use. Carney Crenshaw being insolvent, this action on the case was brought by Hall, the landlord, against Lavender, for damages.

1. A landlord, being by statute entitled to a lien on the crops made by his tenant, for the payment of the rent due from the latter, may have an action against a third person, who carries away such crops from the leased premises, and appropriates them to his own use, whereby the landlord is deprived of his rent.—*Hussey, adm'r v. Peebles*, 53 Ala. 432.

2. Hall having demised the land to Crenshaw, and he having had the occupation and use of it in making crops thereon, during the year 1873, the contract was executed for that period;—and the question whether it was in writing, signed by the parties, according to the statute of frauds, does not arise. Conceding that the attestation of Hall to Crenshaw's signature, to a contract with Hall himself, is not sufficient to make that signature by mark valid; yet, the statute of frauds avoids executory, not executed contracts. Browne on Stat. Frauds, §§ 116, 117, and cases there cited. And in a case like the present, "it is not for a mere stranger to a contract, as is the defendant to the contract between plaintiff and his tenants, to question its validity, because it is offensive to the statute of frauds. The parties may elect to treat it as valid, and to perform it. If they should, others can not avail themselves of an objection to the contract which they have waived."—*Gafford v. Stearns*, 51 Ala. 444; *Waters v. Powers*, 20 Eng. L. & Eq. 410. Hence, there was no error in permitting the writing, to which the landlord and tenant assented, as expressing the terms of their executed agreement, whether signed or not, to be read to the jury, to show what those terms were, in a suit between one of them and a third person.—*Rainey v. Capps*, 22 Ala. 288.

3. What Frank Crenshaw said to appellant, when the lat-

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ter got the cotton in controversy, about the place on which it was raised, was not admissible as evidence to the jury. It can not be suffered that the rights of parties shall depend on such declarations of third persons. And the question designed to elicit such declarations was properly ruled out.

Nor was there any error in refusing to give the written charges asked on behalf of the defendant. The liability of one sued, for the damage produced by his wrongful act to the plaintiff, is not precluded by the circumstance that he did not intend to do the plaintiff an injury. There is no pretense of a claim in this cause to smart money for malicious conduct on the part of defendant.

The charge given to the jury, on their return for further instructions, is free from error. There was evidence tending to show that it was not Hall's fault that the nails and lumber mentioned in the contract were not furnished, but Carney Crenshaw's in not applying for them, and in willfully declining to complete the buildings he was to erect.

Let the judgment of the Circuit Court be affirmed.

## Warren v. Taylor et al.

### *Bill in Equity for Settlement of Partnership Accounts, and Foreclosure of Mortgage.*

60 218  
70 301  
74 351  
76 401  
79 153  
80 485  
82 173

1. *Partner's lien on partnership property.*—On the settlement of partnership accounts, each partner has a lien on the partnership effects, not only for the payment of partnership debts, but also for the payment of any balance due to him from his co-partner on a proper accounting between them.

2. *What are partnership debts.*—A bill of exchange drawn in the name of the partnership, with the knowledge and consent of both partners, is a partnership debt, though used, and intended to be used, in borrowing money for one of the partners individually; and even if the firm name was signed by the partner for whose accommodation the bill was drawn, without the knowledge or consent of his co-partner, but the lender had no knowledge of the intended use to which the money was to be applied, "we are not prepared to say the debt would not be a partnership liability."

3. *Conflicting liens of partner and individual mortgagee or creditor.*—When the partnership name is used, with the consent of both partners, in borrowing money for the individual accommodation of one, who executes to the other a mortgage on his interest in the partnership property as security, and the latter pays the debt, his lien as a partner on the partnership property, for the sum so paid, is not dependent on the mortgage or its registration, and is superior to the lien of a prior unrecorded mortgage, of which he had no notice, but which was recorded before his, and was given for the individual debt of his co-partner.

APPEAL from the Chancery Court of Tuskaloosa.

Heard before the Hon. CHARLES TURNER.

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The original bill in this case was filed on the 7th April, 1875, by John F. Warren, against Joseph W. Taylor and Mrs. Mary C. Benagh; and sought a settlement of a partnership which had existed between the complainant and said Taylor, the foreclosure of a mortgage which said Taylor had given to complainant on his interest in the partnership effects, and the adjustment of the conflicting liens of complainant's mortgage and a mortgage owned by Mrs. Benagh. The partnership was formed on the 1st January, 1872, "for the purpose," as the bill alleged, "of publishing a weekly newspaper in the town of Tuskaloosa, to be called the *Tuskaloosa Times*, and also for the purpose of carrying on a general job printing business connected with said newspaper office." The articles of partnership, which were made an exhibit to the bill, contained the following stipulations: "1. The style of said co-partnership shall be Taylor & Warren, and shall continue indefinitely, except in case of the death of either of the said partners, or mutual agreement for an earlier dissolution. 2. The said partners each contribute as follows: the said Taylor contributes all the type, material, furniture, and good-will of the late *Independent Monitor*; and the said Warren contributes all the type, material, furniture, and good-will of the late *Tuskaloosa Observer*. 3. All profits which may accrue to said partnership shall be equally divided, and all losses happening to said firm, whether from bad debts or any other cause, and all expenses to the business, shall be equally borne by the said partners. 4. The books of said co-partnership shall be regularly kept, and shall always be open to the inspection of both of said partners, and their legal representatives; and an account shall be stated between said partners once a month. 5. The partnership name is to be used only in respect of the affairs and business of the firm, and neither of said partners shall subscribe any bond, sign or indorse any promissory note, accept, sign or indorse any draft or bill of exchange, or assume any other liability, parol or written, either in his own name, or in the name of the firm, for the accommodation of any other person or persons whatever, without the consent of the other party; nor shall either party lend any of the funds of the co-partnership, without the consent of the other partner. 6. Each partner, at the expiration of each month of the partnership, may withdraw, if a balance of profits be due to him, such balance; but neither partner shall withdraw at any time more than his share of the net profits of the business then earned. 7. For the purpose of securing the performance of the foregoing agreements, it is mutually agreed that either party, in case of a violation of them or either of them



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by the other, shall have the right to dissolve this copartnership forthwith."

By mutual consent, the complainant acted as the business manager of the affairs of the partnership, making collections, paying debts, &c.; and monthly balances were struck, as provided by the articles of partnership, until December, 1874, or January, 1875. In March, 1875, disagreements arose between the partners, growing principally out of the mortgages mentioned in the bill, and they agreed to a dissolution. In the complainant's bill, and in the answer and cross-bill filed by Taylor, each party charged the other with a violation of the articles of partnership, in appropriating and failing to account for partnership moneys collected; and each insisted that, on a proper settlement of the partnership accounts, a balance would be found in his favor; but these matters are not material to an understanding of the case, as here presented. On the 22d July, 1874, for the purpose of enabling Taylor to procure money for his private uses, two bills of exchange were drawn in the name of the partnership, with the consent of Warren, by whom they were accepted, payable to James H. Fitts & Co., bankers in Tuscaloosa, who advanced the money on them to Taylor, together amounting to \$1,000, and payable in thirty days; and to secure Warren against liability on his acceptances of these bills, Taylor executed to him a mortgage on his undivided half interest in the partnership business and property, and also on a tract of land in Greene county in which he had an interest. The bills, not being paid at maturity, were several times renewed; and on the 2d October, 1874, a new bill was drawn in the firm name, and accepted by Warren, for \$1,000, and a new mortgage given to secure it, as before. On the 1st March, 1875, the debt was again extended, and a new bill given, which was drawn by Warren, and accepted by the partnership; and instead of giving a new mortgage, a memorandum was indorsed on the former mortgage by Taylor, to the effect that it was "*extended and made to cover*" the new bill. This mortgage was recorded on the 27th March, 1875; and the said bill of exchange, not being paid at maturity, was regularly protested, and was paid by the complainant before filing his bill in this case.

Mrs. Benagh's mortgage also originated in a loan of money to said Taylor on the 8th January, 1874, for which he executed to her his promissory note, and a mortgage on his undivided half interest in the newspaper and printing office. This mortgage was not recorded, but was renewed every three months; and on the 8th January, 1875, a new note and mortgage were given, which matured on the 8th January,

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1876, and the old note and mortgage were delivered up and cancelled. This new mortgage was recorded, by the advice of counsel, on the 23d March, 1875. An answer and cross-bill were filed by Mrs. Benagh, setting up her mortgage, praying a foreclosure, and insisting that she was entitled to priority over the complainant's mortgage.

On final hearing, on pleadings and proof, the chancellor held that the complainant had no lien as a partner, on account of the secured debt which he had paid, but must rely only on his mortgage; and that Mrs. Benagh's mortgage, having been first recorded, was entitled to a preference and priority over his mortgage; and he rendered a decree accordingly, which is now assigned as error by the complainant.

SOMERVILLE & McEACHIN, and S. A. M. WOOD, for appellant.—The general doctrine is indisputable, that one partner can not lawfully sell, transfer, or mortgage his interest in the partnership property, except it be done subject to the equitable lien of partnership debts and liabilities; in other words, that the mortgagee can only claim what remains of the mortgagor's interest after the payment of the firm debts.—1 Story's Equity, 642, § 677; Parsons on Partnership, 366-7, 356, note c; *Winston v. Ewing*, 1 Ala. 129; *Andrews v. Keith*, 34 Ala. 722; 3 Ala. 319; *Siller v. Walker*, 1 Freeman's Ch. (Miss.) 77; *Bank v. Carrollton Railroad*, 11 Wallace, 624; *Rodriguez v. Heffernan*, 5 John. Ch. 417; *Cavender v. Bulteel*, 8 Eng. Rep. 743. The debt secured by the complainant's mortgage, although created for the individual benefit of Taylor alone, and outside of the regular business of the partnership, was nevertheless a partnership transaction, executed in its name, with the express sanction of both partners, and for the purpose of borrowing money on its credit. There can be no doubt that, so long as the bill was held by the parties who had advanced the money on it, it was primarily a partnership debt; and its payment by the complainant did not change its character, although he was liable personally on it. "It is frequently necessary for the salvation of the partnership," said Lord Eldon, "that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm."—8 Vesey, 540. See, also, 3 Kent's Com. (4th ed.) 41, 44; *Mechanics' Bank v. Livingston*, 33 Barbour, 458; *Fagan v. Long*, 30 Missouri, 224; Parsons on Partnership, 212, note d, 226, 140-41; Story on Partnership, § 133, notes, §§ 360-61; Parsons on Mercantile Law, 178; 14 Wendell, 133-46; *Mouldin v. Br. Bank*, 2 Ala. 502; *Foot v. Sabin*, 19 Johns. 154-57; Story's



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Equity, vol. 1, § 675. Moreover, Mrs. Benagh, having knowledge of the existence of the partnership, and being presumed to know the law which regulates the rights and liabilities of partners, was put upon inquiry when dealing with one partner, and thus chargeable with notice of complainant's claim. *Jones v. Webster*, 48 Ala. 109; 5 Johns. Ch. 427.

HARGROVE & LEWIS, *contra*.—As between the two mortgages, Mrs. Benagh's is entitled to priority, because it was first recorded (Rev. Code § 1561), unless she is chargeable with notice, actual or implied, of the complainant's mortgage. There is no pretense that she had actual notice, and the effort is to charge her with constructive notice, on account of her knowledge of the existence of the partnership. The case of *Jones v. Webster*, 48 Ala. 109, cited to this point, is a strong authority against the appellant, when properly understood and applied. The general principle is recognized and admitted, that Mrs. Benagh's mortgage conveyed only Taylor's interest in the property after the payment of the partnership debts.—*Lang v. Waring*, 17 Ala. 145; *Andrews v. Keith*, 34 Ala. 722. But the bill of exchange paid by Warren was, in no just sense, as between these parties, a partnership debt: it was created for the individual benefit and accommodation of Taylor alone, was entirely outside of the scope and business of the partnership, and was regarded by the parties themselves as a private transaction. The mortgage was given to secure Warren personally and individually, and he stands in the same position any other creditor would occupy. No change in the positions of the parties to the bill can, in equity, affect their relations, rights, or liabilities.—25 Ala. 253; 14 Ala. 33, 633; 4 John. Ch. 65; 10 S. & M. 128. There is no room for an application of the doctrine of subrogation. If Warren had not paid the bill, Fitts & Co. might have been subrogated to his rights, and had the mortgage foreclosed for their own benefit; but they had no lien on the partnership effects.—*Donelson v. Posey*, 13 Ala. 769; *Mayer v. Clark*, 40 Ala. 259.

STONE, J.—Money was borrowed separately from two persons, each transaction having its inception about the same time—January, 1874. The evidence of the indebtedness was in each case renewed from time to time, and mortgages given as security on the same property—the borrower's interest in the "*Times*" newspaper and its property. In the case of Mrs. Benagh's loan, the first mortgage was executed directly to her, on the same date as the loan, January 8th, 1874. This mortgage was renewed every three months.



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In the loan by Fitts & Co., bankers, the bill of Taylor & Warren, partners and joint-owners of the *Times* newspaper, was taken as security, due at a short interval. This debt was increased during the year, and was renewed every thirty days. A mortgage on Taylor's interest in the *Times* newspaper was given to Warren, to indemnify him against the use of the firm name, Taylor & Warren. This mortgage was also renewed at short intervals. At the request of Taylor, none of the mortgages were put on record, until March, 1875. Each series of mortgages was renewed, within every three months; and this, it was believed, would preserve the lien from the date of the several mortgages given in renewal, without expense and notoriety of registration. In other words, it was believed that mortgages on personalty might be recorded within three months after their execution, and this would operate constructive notice to creditors and purchasers from their date. Each of the loans was for the personal use of Mr. Taylor, and no part of the money was applied to the purposes of the partnership of Taylor & Warren. Neither Mrs. Benagh, nor Mr. Warren, knew of the mortgage to the other, or that the other loan had been negotiated. On the 23d of March, 1875, Mr. Taylor being short in the payment of interest, promised quarterly, to Mrs. Benagh, she consulted counsel, and, on his advice, had her mortgage recorded on that day. Warren's mortgage was recorded four days afterwards. The question presented is, which has the paramount claim on the mortgaged property? Warren has paid up the bill to Fitts & Co., out of his private funds; and he is the actor in this suit.

1. In settling partnership accounts, each partner is clothed with the right to insist that the partnership effects shall be first applied to the payment of the partnership debts; and this right will prevail over the claims of an alienee or creditor of the co-partner. So clearly defined is this right—so necessary to persons engaging in joint adventures of this kind—that it has been long and firmly settled, that each partner has a lien on the effects, that they shall be applied primarily to the extinguishment of the partnership liabilities. This results, naturally and necessarily, from the nature of the enterprise, and of the title by which the property is held. The title is in the company, or association of individuals, and no one of the number has a separate ownership or right to any part or piece of the property or effects of the partnership. And the lien goes further than this. After the debts are all paid, each partner has a lien on the remaining partnership effects, for any balance due him upon a proper accounting together.—1 Story's Eq. Ju. § 677; *Moore v. Smith*,

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19 Ala. 774; *Donelson v. Posey*, 13 Ala. 752; *Cannon v. Cope-land*, 43 Ala. 201; *McGown v. Sprague*, 23 Ala. 524; *Key-nolds v. Mardis*, 17 Ala. 32; *Reese v. Bradford*, 13 Ala. 837; *Lucas v. Atwood*, 2 Stew. 378; *Emanuel v. Bird*, 19 Ala. 596; *Bridge v. McCullough*, 27 Ala. 661; *Waldron v. Simmons*, 28 Ala. 629; *Andrews v. Keith*, 34 Ala. 722; *Coster v. Bank of Georgia*, 24 Ala. 37; *Parsons on Partnership*, 265, 350, 351, 352, 168, 502; *Bank v. Carrollton Railroad*, 11 Wall. 624; *Rodriguez v. Heffernan*, 5 Johns. Ch. 417; *Sitler v. Walker*, 1 Freem. Ch. Rep. 77.

2. The disputed question in this case is, whether the claim of Warren is a partnership demand. There can be no question that it was a partnership debt, so long as it remained unpaid to Fitts & Co.; and they could have claimed and asserted all the rights against the partnership and its effects, which the law accords to partnership creditors. The bill was executed in the firm name, with the knowledge and consent of both partners; and this bound the firm. Even if the firm name had been signed by one, without authority from the other, the bill was made to be used, and was used in borrowing money; and there is no evidence that Fitts & Co. knew the use to which the money was to be applied. We are not prepared to say the debt would not have been a partnership liability, even if the bill had been executed as last supposed.—*Knapp v. McBride*, 7 Ala. 19; *Jemison v. Dear-ing*, 41 Ala. 283; *Cullum v. Bloodgood*, 15 Ala. 34; 2 Brick. Dig. 306, § 103; *Sprague v. Zunts*, 18 Ala. 382.

The relation between partners is one of generous confidence. In the absence of special agreements to the contrary, the law constitutes each the agent of the other, and the representative of the firm in the conduct of all the ordinary business of the partnership. The act of one is the act of all. If it be a mercantile partnership, a sale by one is a sale by all. And a payment to one member of the firm discharges the debt, although that member may misapply or squander the money. It is not unfrequently the case, that one partner becomes more indebted to the firm than another. He may use more of the income and effects in his personal and private affairs,—may overdraw his share, or may anticipate future receipts and emoluments, sometimes with, and sometimes without his co-partner's knowledge or permission. In either case, his share of the profits, or of the capital, if needed, will stand incumbered by a lien, to make good such deficit to his co-partner; and that lien will be paramount to the right of any alienee or creditor of his. "In general, when a sum of money is advanced to a partner, or a partner is permitted to take it as a loan, and there are no express



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terms agreed on, his profits are in the first place answerable; and if they are insufficient, his share of the stock goes to discharge this balance; and if that is insufficient, he becomes a personal debtor for the balance."—Parsons on Partnership, 241. See, also, 3 Kent's Com., marg. pp. 40 *et seq.*

If, instead of borrowing the firm's credit to raise money on, Mr. Taylor had used its money, or had hypothecated its bills-receivable, and thus realized the sum of them on his private account—and this, either with or without Mr. Warren's consent—the rule above declared would have applied in all its force, and Mr. Warren would have held a lien. So, if there had been a partnership debt of Taylor & Warren, and Mr. Warren had paid it out of his private funds, this would have given him a claim and lien against Taylor's interest in either profits or capital of the partnership, paramount to the rights of creditors of, or purchasers from Taylor. And such creditor or purchaser would have no right to complain: for he would realize, by the transaction, all that Taylor could claim. He would be entitled to no more. In other words, Mrs. Benagh, in this suit, can claim what Taylor could claim, if he were suing Warren; no more. She purchased no other right.—See *Donelson v. Posey*, and other authorities *supra*. She cannot complain of this; for, purchasing a partner's interest in partnership effects, it was her duty to inquire of the other partner, how the account stood between them.

It will be seen that we have placed Warren's superior claim on the lien which the law gave him as a partner. Hence, it was not necessary for him to take a mortgage, or, taking it, to have it recorded. When he incurred the liability for Taylor, by allowing him to pledge the credit of the firm, he had no knowledge or notice of Mrs. Benagh's claim. We need not, and do not decide, that his claim would prevail over Mrs. Benagh's, if, before the firm became bound to Fitts & Co., he had been notified of the conveyance to her.

We hold that, after taking a proper account between the partners, charging Taylor with the sum paid Fitts & Co. and interest, as so much paid to and for him by Warren, the business manager; and charging to each partner all proper debits, and allowing to each all proper credits, if a balance be found due to Warren, he has a first lien on the partnership effects, income and capital, for its payment. This is his share in the partnership effects, and he is entitled to it, before Mrs. Benagh can take any thing by her mortgage. Any balance to be equally divided between Warren and Taylor, the interest of the latter, as far as necessary, to be applied to the payment of Mrs. Benagh's mortgage, and interest



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thereon from January 1st, 1876. Should the balance, on taking the account, be found in favor of Taylor, and against Warren, then such balance to be a first lien in favor of, and applied, as far as necessary, to the payment of Mrs. Benagh's mortgage debt, computed as above. Any balance of partnership effects to be equally divided between the partners; Taylor's share to go to Mrs. Benagh, so far as necessary to extinguish her mortgage claim. If any thing be realized from the mortgaged property in Greene county, the product to be applied to the payment of Warren's claim, if necessary, after exhausting the partnership effects. Should any of the partnership property and effects be used in paying a balance found due to Warren, and should any portion of Mrs. Benagh's claim remain unpaid; and should there remain a surplus of proceeds of the Greene county mortgaged property, after paying Warren's claim, then, to the extent that Taylor's interest mortgaged to Mrs. Benagh is applied to Warren's claim, she, Mrs. Benagh, is subrogated to the mortgage rights of Warren in the surplus of the proceeds of the Greene county mortgaged property.

The decree of the Chancery Court is reversed, and a decree is here rendered, in accordance with the principles declared above. Costs of appeal to be paid by the appellees.

It is referred to the register to take proof, and report an account to the Chancery Court, being governed in the matter of taking the testimony by directions of the chancellor in his decree rendered in this cause. All other questions, including the costs of the original suit, to be determined by the chancellor.

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### *Bill in Equity for Settlement of Partnership Accounts.*

1. *Assignment by partner, of interest in partnership property.*—An assignment by one partner, of all his interest in the partnership property, to a stranger, necessarily operates a dissolution of the partnership; but, when such assignment is made to his co-partner, it does not have that effect, unless its terms show that the parties contemplated and intended his entire withdrawal from the partnership, and the termination of his duties, liabilities, and authority as a partner between themselves.

2. *Mortgage between partners, of interest in partnership property.*—Where two persons are cultivating a crop as equal partners, and one executes to the other a mortgage on his entire interest, as security for an individual debt which the mortgagee has become liable to pay; and the mortgage contains a stipulation, that, since the crop will be gathered before the maturity of the debt, the

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mortgagee shall take possession of it, and dispose of it for the mutual benefit of the parties; and that the net profits, after settlement of the partnership dealings, shall be divided into two equal parts, one of which shall belong to the mortgagee absolutely, and the other shall be held by him in trust for the mortgagor, to be applied to the payment of the secured debt, and the balance paid over to the mortgagor; such mortgage does not operate a dissolution of the partnership, nor affect the duties and liabilities of the mortgagor as a partner; nor does it limit his authority as a partner to contract debts in carrying on the business, and to pay debts so contracted: it only confers on the mortgagee the right to the exclusive possession of the crop, and the exclusive power to dispose of it, and creates a lien on the mortgagor's interest in it as security for the mortgage debt.

3. *Registration of mortgage; effect as constructive notice.*—The registration of a conveyance operates as constructive notice only when the statute authorizes its registration, and only to the extent of those provisions which are within the registration statutes. Hence, the registration of a mortgage, by which one partner conveys to his co-partner his entire interest in the partnership property as security for a debt, while it would operate as constructive notice, as against subsequent creditors and purchasers, of the lien created on the mortgagor's interest in the property, would not have that effect so far as it imposed any restraint or limitation on the authority of the mortgagor as a partner.

#### APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 6th July, 1870, by William O. Monroe, against William M. Hamilton and others; and sought, principally, a settlement of the accounts and transactions of a partnership, which had existed between said Monroe and said Hamilton, and to hold the other defendants accountable for partnership property, which they had received from Hamilton. The articles of partnership, which were dated the 1st January, 1867, and a copy of which was made an exhibit to the bill, contained the following provisions: "The said parties agree to rent about one hundred and sixty-five acres of land, situated in Greene county, Alabama, and to carry on a farm upon the same jointly during the current year, ending December 31, 1867, and to be equally responsible for the value of said rent, which is estimated at three dollars per acre. The said Monroe is to furnish the necessary team (except one horse), to be fed by Monroe as the other team is fed, to cultivate the said lands, and to feed the same until the corn planted and grown upon said land shall be gathered, say about the 1st September, 1867; and after the said 1st September, or when the corn is gathered, the said parties are to bear equally the expenses of feeding the said team, to the end of the year. The said Hamilton agrees, on his part, to hire and pay twelve hands, or laborers, to cultivate said place during said year, and to furnish one horse at his own expense; the said Monroe to feed said horse. In all other matters of expense in carrying on the said farm, the parties are to be equal; each to pay half expenses of all necessary farming utensils, half of the

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blacksmith's bill, half of a four-horse wagon, and to be equal in the expense of all things in and about the carrying on said farm, except such as have been hereinbefore particularly set forth. In witness whereof," etc.

Under these articles of partnership, said Hamilton rented, for the partnership, from one Robert Harkness, several fields, or small tracts of land, one at \$2.50 per acre, another at \$3.00, another at \$4.00, and another field for 7,000 lbs. of seed cotton; and the partners cultivated these lands during the year 1867, and raised a crop of cotton and corn. On the 1st March, 1867, Monroe accepted, for the accommodation of Hamilton, a bill of exchange for \$324, which was payable on the 1st March, 1868, at the office of J. B. & T. C. Clark, and was the property of said J. B. Clark; and he had advanced to Hamilton, to enable him to perform his part of the duties imposed by the articles of partnership, moneys which, on the 9th March, 1867, amounted to \$292.96, and for which said Hamilton, on that day, executed his promissory note, or due-bill. On said 9th March, 1867, Hamilton executed a mortgage to Monroe, which, after reciting the existence of the partnership between them, the accommodation acceptance and indebtedness, and said Hamilton's desire to secure and save harmless the said Monroe against and on account of said acceptance and indebtedness, proceeded as follows: "Now, be it known that, in consideration of the premises," etc., "the said William M. Hamilton has sold, and by these presents doth sell and convey, unto the said William O. Monroe, all his right, title, and interest, in and to the joint partnership crop to be made the present year (1867) by the parties in co-partnership; to have and to hold the same to the said William O. Monroe, his executors, administrators, and assigns; upon condition, nevertheless, that if the said William M. Hamilton shall pay said note, with all interest which may have accrued thereon, and pay off and discharge said bill of exchange, then the above conveyance to be void; but, as said crop will mature and be gathered before the maturity of said bill, it is hereby agreed that, as soon as said crop is gathered, and the cotton picked, or in a reasonable time thereafter, it shall go into the hands of the said William O. Monroe, who is hereby authorized to take possession of the same, and to dispose of the same for the mutual benefit of the parties; and when the proceeds is realized, the parties shall proceed to settle all the partnership dealings, and divide the net profits into two equal shares, one of which shall belong to said William O. Monroe absolutely, and the other he shall hold in trust for the said William M. Hamilton; out of which he shall first pay said note and interest, and then



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pay, or hold for that purpose enough to pay off said bill of exchange, and pay the residue over to the said William M. Hamilton. In witness whereof," etc.

This mortgage was regularly acknowledged by both of the said parties, and was admitted to record on the 11th March, 1867. A copy of this mortgage was made an exhibit to the bill, and the facts attending its execution, as above stated, were alleged in the bill. The bill alleged, also, that the crop raised by said partnership on said rented lands amounted to about thirty-nine bales of cotton, of which number the complainant had succeeded in getting possession of ten bales, while the residue had passed, in disregard of his rights, by some arrangement with said Hamilton, into the possession of said Robert Harkness, and of Sims, Harrison & Co., and one John P. Rice; that Hamilton had by some means paid off the bill of exchange held by Clark, but had never paid any part of the note or due-bill to the complainant; that he was insolvent, and had left the State, leaving the partnership accounts unsettled. Harkness, Rice, and Sims, Harrison & Co., with Hamilton, were made defendants to the bill; and the prayer was, that an account might be taken of all the partnership dealings, and that each of said defendants might be required to account for the value of the cotton which they had respectively received.

A decree *pro confesso* was entered against Hamilton. An answer to the bill was filed by Harkness, alleging that the cotton which he had received was delivered to him by Hamilton in payment of the rent of the land; that he claimed a lien on the cotton, and would not let it be removed until the rent was paid. An answer was also filed by Sims, Harrison & Co., admitting that they, as commission-merchants in Mobile, had received several bales of cotton from Hamilton, which they had sold, and, by his directions, had applied the money in payment of the bill of exchange held by Clark; and they denied that they had any notice, actual or constructive, of the mortgage, or the rights claimed by the complainant under it. Rice also answered, and admitted that he had received two bales of cotton from Hamilton, part of the crop raised by him and Monroe; and he alleged that it was delivered to him in payment of a note which he held against them, due January 1, 1867, on which he had granted indulgence to said Hamilton during the year 1867, on his promise that it should be paid out of their crop of that year; and he denied all knowledge of the partnership transactions between Monroe and Hamilton. Each of these defendants also demurred to the bill, for want of equity, for multifariousness, and because the complainant's remedy as against them, if he

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had any, was at law. The chancellor sustained the demurrer, on the second and third grounds, and dismissed the bill; but his decree was reversed by this court, at its January term, 1872, and the cause was remanded, as shown by the report of the case, 47 Ala. 217-20.

After the remandment of the cause, the chancellor held, on final hearing on pleadings and proof, that the complainant could not repudiate the payments made by Hamilton to Harkness, nor complain of the transactions between Sims, Harrison & Co. and Hamilton; and on the statement of the account by the register, showing that the complainant had received more of the cotton than he was entitled to, he confirmed the report, and dismissed the bill. The directions to the register in the statement of the account, and the final decree, are now assigned as error.

R. CRAWFORD, for appellant.—1. The mortgage from Hamilton to Monroe was legal and valid.—*Means v. Kirksey*, 42 Ala. 426. The registration of said mortgage operated as constructive notice of its contents to all the world.—Rev. Code, §§ 1543, 1553.

2. Purchasers from Hamilton, having notice of the mortgage, acquired no title as against the complainant, and only succeeded to Hamilton's ultimate interest in the net profits; that is, the contingent interest which would remain to him, after the adjustment of the partnership accounts, and the payment of the secured debts. The effect of the mortgage, with its registration, was to make the partnership special and limited; and it expressly deprived Hamilton of all power to sell the cotton. A sale by him was beyond his authority, and a purchaser from him was, equally with him, guilty of a conversion.—See the former report of the case, 47 Ala. 217. For such conversion, the purchaser is liable in equity, as he would be at law, for the highest market value of the cotton, from the time of the conversion, to the date of the recovery.—44 Ala. 314; 20 Ala. 694; 26 Ala. 213; 27 Ala. 468.

3. Hamilton could not convey title to the cotton, either as mortgagor or special partner, although the purchaser was in fact ignorant of said mortgage or said partnership.—12 Peters, 221; 16 John. 39; 14 Wendell, 133; 11 Barbour, 312; 11 Sm. & Mar. 322; 1 Parsons on Contracts, 184-5, and notes.

4. Equity reinvests a partner with partnership assets thus disposed of, when his co-partner is insolvent, and there are outstanding partnership liabilities.—*McGown v. Sprague*,

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23 Ala. 524; *Halstead v. Shepard*, 23 Ala. 573; Story on Partnership, 509-10.

E. MORGAN, with whom was W. COLEMAN, *contra*.—The mortgage did not destroy the partnership, nor in any manner affect the rights, duties, and powers of Hamilton, as a partner, except, perhaps, in the single matter of selling the cotton crop. He was still bound to perform all his duties as a partner in carrying on the business, and had power to contract debts in the name of the partnership, and to pay partnership debts. The mortgage only conveyed his interest in the net profits after the payment of the partnership debts, for that is the only individual interest a partner has.—13 Ala. 768. Each partner may, in the absence of fraud, dispose of the partnership funds as he pleases, and especially may he pay partnership debts.—2 Strobb. 520. He who seeks equity, must do equity; and an application of this maxim to the facts of this case, as disclosed by the statement of the account between the parties, shows that the complainant has no cause of complaint.

BRICKELL, C. J.—The mortgage is a conveyance to Monroe of Hamilton's interest *in and to the joint partnership crop*, subject to the condition, that it is to become void, if at maturity he should pay the mortgage debts. These are his individual, not partnership debts; and as the crops would be gathered, and ready for market, before the maturity of the debts, it is stipulated, that when gathered, or in a reasonable time thereafter, Monroe should take possession, and dispose of them, for the *mutual benefit of the parties*, and should settle the partnership dealings, and divide the net profits into two equal shares; one of which should belong to him absolutely, and the other he should hold in trust for Hamilton, first paying therefrom the mortgage debt, and the residue paying over to Hamilton. The material question is, how far the mortgage operates a limitation of the authority of Hamilton, as partner, to dispose of the partnership crops, to persons not having actual notice of the limitation; and whether the registration of the mortgage operates as constructive notice of such limitation.

An assignment by a partner, of all his interest in the partnership property, to a stranger, operates a dissolution of the partnership, of necessity: "it gives rise to a state of things altogether incompatible with the prosecution of a partnership concern." The other partners may not have confidence in the assignee, and may well say that they have not with him entered into a common adventure, nor consented that



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he should exercise the authority of a partner; nor may the assignee choose to risk his credit and property in an adventure with them.—*Marquand v. N. Y. Man. Co.* 17 Johns. 525; Parsons on Part. 400. An assignment by one partner to another, of his interest in the partnership property, is not, *ipso facto*, a dissolution of the partnership. Whether it shall so operate depends on its terms, and the intention of the parties, as from these it may be collected. If the withdrawal of the assignor from the partnership is contemplated—if there is a termination of his authority and duty as partner, and, as between him and the assignee, exemption from liability for the future transactions which may be had by the assignee, in the prosecution of the original undertaking, it is as to them a dissolution.—Parsons on Part. 400. But, when the assignment is intended as a mere security for a debt, and is to operate only on the share of the net profits of the assignor, on a settlement of the partnership transactions, at the expiration of the partnership, and he remains bound to all duties as partner—bound to contribute time, labor, and skill to the prosecution of the common undertaking; it will not operate a dissolution, not even as between the partners themselves.—*Taft v. Buffum*, 14 Pick. 322; *Buford v. Neely*, 2 Dev. Eq. 481.

2. Applying this principle to the mortgage, it did not operate a dissolution of the partnership. Hamilton remained bound to all duties as partner, nor was he relieved from liability for the future transactions, within the scope of the partnership business. Such transactions were a necessity to the business in which the partnership was engaged, and are contemplated by the articles of partnership. At the execution of the mortgage, but a small part, if any, of the partnership crops could have been planted. In the course of cultivation, and of gathering, expenses would be necessarily incurred, for which no provision is made by the articles of partnership, than that they are to be borne equally by the partners. There is no limitation in the mortgage, of the authority of Hamilton to make contracts for such expenses, nor of his authority to pay them when contracted. In this respect, his authority is precisely that which is derived by implication of law from the nature of the partnership business; and there is no indication in the mortgage, of an intention to withdraw, or to restrain it. The whole effect of the mortgage is to take away his power as partner to dispose of the crops, conferring on Monroe the right to the exclusive possession of them, and the exclusive power to dispose of them when gathered, and to create a lien on Hamilton's share of the net profits derived from a sale of the crops, as a secu-

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ality for the payment of the mortgage debts. The mortgage has a two-fold operation—a limitation of the authority of Hamilton as partner, and a charge on his share of the net profits. The undivided interest of Hamilton in the partnership crops when gathered, or in any other part of the partnership property, would have been subject to levy and sale under execution against him, in favor of an individual creditor; and a purchaser at such sale would have been entitled to his share thereof, as ascertained on a settlement of the partnership accounts.—*Winston v. Ewing*, 1 Ala. 129; *Moore v. Sample*, 3 Ala. 319; *Andrews v. Keith*, 34 Ala. 722.

3. The mortgage, conveying an interest subject to execution, must have been registered in compliance with the statute, to protect the mortgagee against the rights of judgment creditors, or of subsequent purchasers from the mortgagor. Code of 1876, § 2162. The registration, when properly made, operates as constructive notice to all the world, of the mortgage—of the conveyance of Hamilton's share of the crops—of the property which would be subjected to execution against him. No lien in favor of execution creditors can subsequently attach, and override and defeat it; and every subsequent purchaser from him, of such share, would be charged with notice of it. This principle of constructive notice from registration is confined to instruments which the statute authorizes to be registered. It cannot be extended to any and every instrument which parties may think proper to register. There must be a statute authorizing the registration, or mere registration will not operate notice.—*Mitchell v. Mitchell*, 3 S. & P. 81; *Duffphey v. Freenay*, 5 S. & P. 215; *Baker v. Washington*, *Ib.* 142; *Tatum v. Young*, 1 Port. 298. Nor will registration operate as constructive notice of any and every provision which may be introduced into an instrument, of which it is required. A conveyance of personal property may include a transfer of *choses in action*, and, while operating as constructive notice of the transfer of the particular personal property described, it would not operate as a notice of the transfer of the *choses in action*.—*McCain v. Wood*, 4 Ala. 258; *Stewart v. Kirkland*, 19 Ala. 162. The reason is obvious; the law does not authorize the registration of transfers of *choses in action*, and, therefore, does not cast on those dealing with him who has the possession, and the apparent legal title, the duty to ascertain whether there has been an assignment of them. We have no statute (except as to limited partnerships), which authorizes the registration of articles of partnership, or of limitations or restraints which, by agreement, may be placed on the power and authority of a partner. While, so far as the mortgage

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is a conveyance of Hamilton's undivided share of the joint crops, its registration is constructive notice thereof, so far as it is a restraint or limitation of his authority as partner, the registration is not constructive notice.

Limitations or restraints, which partners, by agreements between themselves, may impose on the authority or power of the several partners, varying or qualifying that which the law implies from the relation, and the nature and character of the partnership business, have no effect upon third persons, dealing with the partners in good faith, and in ignorance of them, though they may be valid and binding as between themselves.—Parsons on Part. 93 ; Collyer on Part. § 386.

The bill seems to have been filed, rather in a double aspect—the one to assert the right of the complainant as mortgagee, to pursue the cotton Hamilton had disposed of, though such disposition was within the scope of his power as partner, if it had not been limited and restrained by the provisions of the mortgage, or rather the necessary implication from these provisions. The averments of notice of the limitation and restraint on his power, to those dealing with him, are referrible to the averment of the registration of the mortgage, which it is evident the pleader supposed operated constructive notice thereof. The answers deny all notice, and of it there is no evidence. In this respect, therefore, the bill must fail.

The other aspect is, the right of the complainant to pursue partnership assets his co-partner had misappropriated. In this aspect, the bill fails, for want of proof of such misappropriation, prejudicial to the complainant. Whatever of misappropriation may be shown, was in payment of debts for which the complainant was bound individually. The partnership debts having been fully paid, from it no injury resulted to him.

The decree of the chancellor was certainly as favorable to the appellant as the pleadings or facts would justify, and it must be affirmed.



[Smith's Adm'r v. Bryant's Adm'r.]

## Smith's Adm'r v. Bryant's Adm'r.

### *Final Settlement of Accounts of Deceased Administrator.*

1. *Landlord's statutory lien on crop, for rent.*—A landlord's lien on the crop of his tenant, for the rent of the leased premises, is created by the statute (Code of 1876, § 3467), and not by the levy of an attachment, which is only given as a remedy for enforcing it; but it extends only to the crop of the current year.

2. *Retainer by tenant's administrator, for rent due him as landlord.*—If the tenant dies after his crop is gathered, and letters of administration on his estate are granted to his landlord, the latter may retain, out of the proceeds of the sale of the crop, the amount due for the rent of the current year, and is not required to go into equity for relief; but he cannot retain for the rent of a former year, and, if the estate is insolvent, can only share *pro rata* with other creditors.

3. *Testimony as to any transaction with or statement by deceased person.*—When the estate of any deceased person is interested in the result of a suit, a party to the suit is not allowed to testify as to any transaction with or statement by the deceased (Code of 1876, § 3058); but the statute does not forbid any other person, not a party, to testify as to any such transaction or statement.

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| 84 | 341 |

### APPEAL from the Probate Court of Sumter.

In the matter of the final settlement by A. G. Smith, as administrator of the estate of E. W. Smith, deceased, of his intestate's accounts and vouchers as administrator of the estate of Washington Bryant, deceased. On said settlement, said administrator claimed a credit, "as per voucher No. 1 of his account," in these words: "May 4, 1874. Balance of rent of 1872, reserved out of crop of 1872, \$240, and interest to day of sale, \$26.13—\$266.13." This item was contested by the administrator *de bonis non* of Bryant's estate. The evidence adduced in reference to it is thus stated in the bill of exceptions:

"It was proved that said Bryant died in April, 1873; and it was admitted that his estate is insolvent, though not as yet declared so. Accountant (Smith's administrator) offered to prove, by Jane, the widow of the deceased, the terms of renting between E. W. Smith and Washington Bryant: that she knew the six bales were reserved for the rent of 1872, from the declarations of her said husband, who told her, in the latter part of 1872, that he had not finished paying the rent; that early in 1873, a short time before he died, she heard him tell said E. W. Smith, at his (Bryant's) house, where he was sick, 'There was the cotton, he reckoned he would have to take that for the rent;' that he said, among other things, in the same conversation, 'If I should happen

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to die, you better come out and clamp this cotton'; that she knew the rent of 1872 was not paid, from conversations with her said husband; that she and her husband talked about it, and he and E. W. Smith in her presence; and that this conversation was before the crop of 1873 was pitched. To all and every part of which said statements, the contestant objected," on the ground that it was hearsay evidence, and because the witness was the widow of said Bryant, "and because it was contrary to the spirit and letter of section 2704, Revised Code." The court sustained the objections, and excluded the evidence; to which an exception was reserved by Smith's administrator.

"Geo. W. Dainwood testified as follows: 'Wash. Bryant sold ten bales of cotton to S. & A. Brown. On the 2d October, 1872, E. W. Smith came, and asked Mr. S. Brown if he had bought Wash's cotton; and Brown answered, that he had. Smith told Brown, that his lien for rent would follow the cotton wherever it went. Brown asked him, how much Wash. owed him; and Smith said, between \$350 and \$400. Brown told him, that he would pay it; and Smith said, 'That was all right—he could take the cotton, and do what he pleased with it.' On the 30th October, 1872, Wash. came into the store, and said, that he wished to pay Mr. Smith his rent of 1872; and Brown told him to go and get Mr. Smith, and bring him down to the store, and he would give him a draft for the rent. Wash. then went out, and in a few minutes he and E. W. Smith came back together; and Brown then gave Smith a draft on A. Proskauer & Co. for \$400. The cotton mentioned was the crop made in 1872.' The court permitted what occurred in the absence of E. W. Smith, as connected with what immediately occurred, as part of the *res gestæ*; which was, that said E. W. Smith, who was not present, was sent for, and came in, and received \$400 from said Brown, for said Bryant, by draft, which was good. The year 1872 was not mentioned in Smith's presence. To this ruling of the court, permitting the declaration of Bryant before Smith came up to be given in evidence, the accountant then and there excepted.

"Adolph Brown testified: 'About October 2, 1872, Wash. Bryant brought ten bales of cotton to the firm of S. & A. Brown, and it was carried to the depot in Livingston. It was the crop of 1872. Witness went and marked it, and returned to their store. E. W. Smith came to the store immediately afterwards, and told witness he had a rent lien on the cotton for between \$360 and \$400, and that his lien would follow the cotton wherever it goes. Witness remarked, that it was all right. Afterwards, on the 30th October, 1872,

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Wash. Bryant came into the store, and said he wanted to pay his rent to E. W. Smith. He was told to go and bring up Smith; and he went and brought said Smith to the store with him. S. & A. Brown then gave said Smith a draft on A. Proskauer & Co. for \$400," which the witness produced, and which, he testified, was paid. "It was proved, also, that Wash. Bryant rented land from said E. W. Smith for several years previous to his death; that the rental value was \$360; that the six bales of cotton on the debit side of the account were a part of the crop of 1872, and were left by the decedent on the premises at the time of his death. The accountant proved, also, by R. W. Ennis, that according to the best of his recollection, in the early part of the year 1873, Bryant told him that he was owing Smith, for rent and other things, five or six hundred dollars; and that he also told him, early in 1872, that he had not paid the rent of 1871, according to his best recollection. It was in proof that the crop of 1871 was eighteen or nineteen bales; that one Ennis, a merchant, received ten bales of that for supplies, and one Brown, another merchant, six or eight bales; that this was a short crop; that Brown received, of the crop of 1872, eighteen bales on account, which did not pay his claim, and the six bales went into the hands of said Smith, the administrator."

"This was the substance of all the proof; and the court thereupon rejected the said item and voucher, and refused to allow any credit for rent for the year 1872; to which ruling and decision the said accountant then and there excepted."

The rejection of the claim, and the rulings on the evidence to which exceptions were reserved, are now assigned as error.

THOS. B. WETMORE, for appellant.

R. H. SMITH, and THOS. COBBS, *contra*.

MANNING, J.—The lien of a landlord upon a crop grown on leased premises, for the payment of rent, is given by the statute on the subject, and not by the attachment which, under certain circumstances, the statute authorizes. The attachment is merely a mode of *enforcing* the lien by proceedings at law, not of creating it. Hence, we have lately held that a court of equity may be resorted to by the landlord, when this becomes necessary to make his lien available for the payment of the rent.—*Westmoreland v. Foster*, and *Abraham v. Hall*, in MSS.



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The lien, thus having an existence independent of the attachment, may of course, and should, be recognized by the parties to the lease, and effect given to it voluntarily. If the tenant, when the crop is gathered, should turn the portion of it necessary, over to the landlord to be converted into money to pay the rent, or, with the consent of the landlord, should himself sell it and pay the rent out of the proceeds, the transaction would be a proper one.

In the present case, the tenant having died after the crop was gathered, and the landlord having become administrator of his estate, the cotton in controversy, part of the crop, went into his hands; and he was the representative of the tenant as well as himself the landlord. Did he thereby lose his lien on the crop? Assuredly not. Must he, in order to enforce it, as he could not do so at law, go into a court of equity, have an administrator *ad litem* appointed under the statute, and thus create against the estate a heavy bill of costs? This would be very improvident, and ought not to be encouraged. What then should be done? It would be perfectly proper for him, upon a sale of the cotton, to retain the rent, for which he had a lien upon it, out of the proceeds, and credit himself in his accounts as administrator with so much paid on account of the estate. He stands in the places of both the landlord and tenant; and may retain for the same reason that a preferred creditor of an estate, of which he is administrator, may pay himself, in preference of other creditors whose claims are by law postponed to his.

The judge of probate erred, if he denied the administrator's lien on the ground that it could exist only in virtue of an attachment. But if, as some of the evidence seems to indicate, the rent for the year 1872 was paid by a purchaser of the crop made in that year, and only the rent for the year 1871 remained due, the landlord was not entitled to a lien for it upon the crop of 1872, or to pay himself out of the assets of an insolvent estate, from the proceeds of that crop. He would be entitled only to his *pro rata* share with other creditors.

The court erred in excluding the testimony of the widow of the tenant, to prove, at the instance of the landlord, the contract of renting between him and her husband, made in her presence. Section 3058 (2704) of the Code of 1876 does not, by the exception therein, exclude one who is merely a witness from testifying as such, concerning an agreement or conversation between the deceased and another person. It excludes only a party to the transaction or conversation testified about, or a representative in the litigation, of such

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party, from giving his own version of it in his own interest, after the death of the other party.

Judgment reversed, and cause remanded.

## The State, use &c. v. Bradshaw's Adm'r et al.

*Bill in Equity, at Suit of State, against Defaulting County Superintendent.*

1. *Public officers; jurisdiction of equity, in matter of accounts of.*—A court of equity will not entertain a bill, at the suit of the State, against a public officer who has given an official bond for the performance of his duties—*e. g.*, a county superintendent of education—to compel a settlement of his accounts, or the correction of errors in a settlement already made with the proper officer, on the ground that he is a trustee; nor on the ground of fraud, because, on said settlement, by fraud or collusion, he used vouchers which had been used on former settlements, and thereby procured the allowance of credits to which he was not entitled; nor on the ground that the accounts are complicated. The remedy at law is full, adequate, and exclusive.

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APPEAL from the Chancery Court of Sumter.

Heard before the Hon. THOMAS B. WETMORE, as special chancellor, selected by the parties, on account of the incompetency of Chancellor A. W. DILLARD, who was related to one of the parties.

The bill in this case was filed on the 23d March, 1875, in the name of the State of Alabama, suing for the use of Sumter county, against the administrator of Robert Bradshaw, deceased, and the sureties on the official bond of said Bradshaw as county superintendent of education in and for said county of Sumter; and prayed a settlement of said Bradshaw's accounts as county superintendent, the vacating and annulling of a settlement made by his administrator with the superintendent of education, on the ground of fraud and mistake, and for general relief. On final hearing, on pleadings and proof, the special chancellor held that, though the evidence showed fraud on the part of the administrator, in his settlement with the office of the superintendent of education, to which the superintendent himself was not a party, yet no case was presented for the interposition of a court of equity, as the remedy at law was adequate and complete. He therefore dismissed the bill, and his decree is now assigned as error.

R. H. SMITH, and THOS. COBBS, for appellant, cited *Norton*

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*v. Hixon*, 25 Illinois, 452; *Hay v. Marshall*, 3 Humph. 623; *McRea v. Purmort*, 16 Wendell, 460; *Fowle v. Lawrason*, 5 Peters, 503; *Farmers' Bank v. Polk*, 1 Del. Ch. 167; *Davis v. Davis*, 1 Del. Ch. 256; *Story's Equity*, §§ 442-44, 451, 457, 465; *Adams' Equity*, § 224; 1 *Perry on Trusts*, 32, 43.

COOK & LITTLE, *contra*, cited *Knotts v. Tarver*, 8 Ala. 743; *Russell v. Little*, 28 Ala. 160; *Kimball v. Moody*, 27 Ala. 131; *Dickinson v. Lewis*, 34 Ala. 638.

STONE, J.—All officers, having the control and disbursement of moneys, are, as to such moneys, charged with a trust. They do not hold the moneys in their own right, but in trust for others, either the public, or individuals. But these official trusts are not of the class which we are accustomed to characterize as private or personal trusts. Officers thus charged have their duties defined by law, and they are bound by bond and sureties for the faithful observance of those duties. Sheriffs, probate judges, tax-collectors, and treasurers of counties, cities or towns, are among the officers to whom trusts of this nature are confided. These are public trusts. But bonded public officers, charged with the collection, custody and disbursement of moneys, public or private, and whose duties are hedged about by a complete system of legal directions and restraints, do not fall within that class of trustees who can be brought to account and settlement of their trusts in a court of equity, unless some special equity can be averred and shown.

The bill charged that Bradshaw, as county superintendent of Sumter county, had received divers sums of school funds, "amounting in the aggregate to forty-one thousand four hundred and eight dollars and thirty-nine cents, and he and his administrators have only accounted for thirty-nine thousand and nineteen dollars and thirty-six cents." The bill then makes an exhibit of account made out against the superintendent, setting forth the several sums received by him, and the disbursements for each year, and showing a balance unaccounted for of \$10,019.66. The bill then charges, that Bradshaw's administrator had a pretended settlement of his intestate's official accounts, in the office of superintendent of public instruction; and that in that pretended settlement he fraudulently procured to have allowed as credits a large number of vouchers amounting to \$3,308.50 of the fund of 1866; \$4,903.62 of the fund of 1867, and \$1,700.22, other miscellaneous vouchers. The bill then proceeds: "Your orator is not fully informed how this great fraud was accomplished, but says it was done either by imposition by said



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administrator on the officers with whom the settlement was made, or by collusion between said officers and said administrator, in some manner unknown to your orator. Said administrator of Robert Bradshaw obtained possession of said vouchers, which had been allowed in previous settlements of said Robert Bradshaw's accounts as superintendent as aforesaid, and, producing them, had them again allowed as credits, and thus had fraudulently obtained credit for \$9,912.46; which sum, with interest, said Robert Bradshaw, nor his administrator has accounted for, and for which his said bonds are liable, as well as for such other sum as shall make up said sum of \$10,019.60, besides interest on said moneys. Your orator shows that, either through the fraudulent concealment of the officers of the State with whom the settlement was made, or through their ignorance that said vouchers reproduced and allowed were fraudulent, your orator was wholly ignorant that the settlement was false and untrue, until about December 14, 1873," &c. The foregoing are substantially all the averments of the bill, tending to bring it within the jurisdiction of the Chancery Court. The bill was filed in March, 1875; and the foot-note dispenses with sworn answers, and thus shows that the bill was not filed for a discovery.

The grounds relied on in support of the jurisdiction are, first, that the funds in the hands of Bradshaw, the superintendent, were a trust fund, and it is part of the original jurisdiction of the Courts of Chancery to bring trustees to account and settlement. We have shown above that this is not such trust as comes within that rule. The second ground is the alleged fraud in the pretended settlement. Fraud is as open to inquiry and condemnation in a court of law, as it is in a court of equity. "No matter how great the fraud may be, if the party can have full, complete and adequate redress at law, he can not go into a court of equity."—*Knott v. Tarver*, 8 Ala. 743. The third ground is, that the accounts are complicated and difficult of settlement, and therefore the Court of Chancery is alone capable of disentangling it. This, in a proper case, is an acknowledged head of equity jurisdiction. "But, where the bill contained no allegation of any complexity in the accounts, or any mutuality, so that it was mere matter of ordinary contract, it was not entertained."—*Story's Eq. Ju.* § 442 *a*.

In *Dickinson v. Lewis*, 34 Ala. 638, this court laid down a rule, which we think entirely sound. It was there said: "There was nothing more than an account on one side, with credits for payments made. Of such an account, chancery has not original and independent jurisdiction. There was a

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plain, adequate, and complete remedy at law for the enforcement of his demand by the creditor, and for the assertion by way of defense of all his rights by the debtor. It is true that chancery sometimes takes jurisdiction where there is no mutuality, on account of its complication; but it only does so, where there is a strong case of entanglement. This account, certainly does not present that strong case of entanglement, or complication, which is necessary to maintain the equity jurisdiction." The bill in the case from which we have quoted was filed to open a settlement previously made, and closed by note, on account of alleged overcharges in the account by which the indebtedness was made to appear too large. Still, this court refused to entertain the bill, because there was a complete and adequate remedy at law, in defense to the notes. See, also, *Paulling v. Lee*, 20 Ala. 753, 768; *Russell v. Little*, 28 Ala. 160; *Crothers v. Lee*, 29 Ala. 337. And the authorities cited from other States and jurisdictions are not materially variant from the rule as declared in this court. In *Fowle v. Lawrason*, 5 Pet. 495, 503, Ch. J. Marshall, speaking on this subject, said: "Great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction." So, in 1 Del. Ch. 167, 175, the court said: "These transactions are so complicated, so long and intricate, that it is impossible for a jury to examine them with accuracy." They were the accounts of a bank cashier. *Farmers' & Mech. Bank v. Polk*. Of similar import is *Hay v. Marshall*, 3 Humph. 623.

We have been referred to the case of *Norton v. Hixon*, 25 Ill. 439. That case comes nearer sustaining this bill than any case we have seen. But it rests on a false analogy. It was a proceeding against a sheriff, to make him account for moneys which had come to him by virtue of his office of sheriff. The court entertained jurisdiction, remarking: "There are many cases where executors and administrators have been held answerable in equity, at the suit of creditors and legatees, for misapplication of assets, although the complainant had a perfect remedy at law on the official bond of the defendant. The same jurisdiction seems always to have been exercised over assignees in bankruptcy, where the law also afforded the same remedy. In such cases as these, no doubt seems to have been entertained of the jurisdiction of the court to afford the appropriate remedy. Here is as much a violation of a trust as in those cases." The vice of this argument lies in the fact, that while the sheriff is an acknowledged public officer, serving the public, executors,

[Posey v. Pressley.]

administrators, guardians, and assignees in bankruptcy, are in no sense officers, and are merely clothed with a trust. Chancery has always entertained jurisdiction of trusts and trustees proper.—*Davis v. Davis*, 1 Del. Chan. 256; *McRea v. Purmort*, 16 Wend. 460; *Crompton v. Vasser*, 16 Ala. 259; *Vincent v. Rogers*, 30 Ala. 471; *Whitworth v. Oliver*, 39 Ala. 286; 1 Brick. Dig. 647, § 120.

We concur with the special chancellor, who presided in the trial of this cause, and hold that the complainant had a complete and adequate remedy at law, and the present record shows no special equity to take the case out of the operation of the general rule.

The decree is affirmed.

## Posey v. Pressley.

*Statutory Action for Unlawful Detainer of Lands, brought by Judgment Creditor against Purchaser at Execution Sale.*

1. *Who may redeem.*—The plaintiff in the judgment, under whose execution the land was sold, is embraced in the general words of the present statute, “all judgment creditors of the debtor” (Code of 1876, § 2881), and may redeem from the purchaser at execution sale, if his judgment was not obtained by confession, and was not satisfied by the sale.

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2. *Re-enactment of statute judicially construed.*—The substantial re-enactment, in the Code of 1852, of a statute which had been judicially construed by this court, is a legislative adoption of that judicial construction; and the mere omission of special words found in the former statute, and which are embraced in the general words used in the Code, will not be held to imply a change in the statute.

3. *Permanent valuable improvements.*—When permanent valuable improvements have been erected on the land, by the purchaser at execution sale, or other person holding possession under him, the creditor proposing to redeem must pay, or offer to pay, their value, as a part of the “lawful charges” (§§ 2881, 2887); but, if he makes a general offer to redeem, and his right to redeem is denied, he is excused from making any particular inquiry as to a claim for improvements.

4. *Limitation of action.*—Three years is the statutory limitation of an action for the unlawful detainer of lands (Code of 1876, § 3705); yet, when the action is brought by a judgment creditor, or other person having a statutory right to redeem, whose offer to redeem has been refused, quiet possession for three years after the sale is not necessarily a bar, since the statute does not begin to run until the accrual of the plaintiff’s cause of action by the tender and refusal.

5. *Outstanding or superior title acquired by purchaser.*—If the purchaser at execution sale, or person holding possession under him, afterwards acquires an outstanding or superior title, he can not refuse an offer of redemption on that account, nor set up that title in defense of an action of unlawful detainer at the suit of the person offering to redeem: he must surrender the possession, and convey the interest which he acquired by the sheriff’s deed, and then assert his superior title by proper action.



[Posey v. Pressley.]

APPEAL from the Circuit Court of St. Clair.

Heard before the Hon. WM. L. WHITLOCK.

This action was brought by William R. Pressley, against Amos L. Posey and James Williams, to recover the possession of a certain tract of land, "known as the Philemon Bradford place;" and was commenced, before a justice of the peace, on the 31st August, 1875. There seems to have been some misdescription of the lands, or some question as to their identity; which, however, requires no special notice, as the case is here presented. The record does not show which of the parties removed the case into the Circuit Court. The plaintiff had obtained a judgment against said Philemon Bradford, in the Circuit Court of said county, on the 20th March, 1866, for \$258.30, besides costs; and an *alias* execution on this judgment was levied on said lands, as the property of said Bradford, on the 1st February, 1871. At the sheriff's sale under this levy, on the 2d October, 1871, James H. Vandegrift became the purchaser, at the price of \$50, and received the sheriff's deed; and on the 4th August, 1872, he sold and conveyed to said A. L. Posey, the principal defendant; the deed reciting the payment of \$215 as its consideration, and containing covenants of warranty against the grantor, his heirs, and all persons claiming under him. The plaintiff's judgment against Bradford being unsatisfied, he claimed the right to redeem the lands under the statute (Rev. Code, §§ 2509-21); and his offer to redeem being refused, he brought this action. The defendant pleaded "the general issue, and the statute of limitations of three years;" and issue was joined on these pleas.

On the trial, as the bill of exceptions shows, the plaintiff read in evidence his judgment and execution against Bradford, under which the land was sold as above stated, with the sheriff's indorsement; and then introduced one James Foreman as a witness, "who testified, in substance, that said A. L. Posey was in possession of said land at the commencement of this suit. The plaintiff proposed to prove by said witness, also, that some time during the month of July, 1875, he, in company with said witness, met said Posey, who was then claiming to be in possession of said lands, by and through his tenant, James Williams; and that plaintiff then and there offered to redeem said lands, and tendered to said Posey the amount bid for said lands at said sheriff's sale, to-wit, \$50, and ten per cent. *per annum*, together with all lawful charges, and that said Posey refused to accept the money thus tendered. The defendants objected to the introduction of this evidence, as irrelevant and inadmissible, on the ground that the plaintiff had no right to redeem under said judgment

[Posey v. Pressley.]

under which the lands had been sold; but the court overruled the objection, and permitted the evidence to go to the jury; to which action and ruling the defendants excepted." The plaintiff proved, also, that he had entered on the execution docket a credit of \$5.00 on his judgment, being ten per cent. of the amount bid at the execution sale; and that he had made a written demand of possession before the commencement of the suit.

"The defendant Posey then testified, as a witness for himself, that he went into absolute possession of said land, on the 4th August, 1872, under a purchase and conveyance from said James H. Vandegrift; that he claimed and held possession, also, under a purchase and conveyance on the 8th February, 1872, from one N. J. Wilhite, who was then in possession of said lands, occupying and claiming to be the owner thereof under a purchase and conveyance from said Philemon Bradford, the defendant in execution; and to show the character and extent of his possession and claim, he introduced, without objection, the deed from said Wilhite to him, and the deed from said Bradford to Wilhite." Bradford's deed to Wilhite was dated 25th September, 1871, recited the payment of \$500 as its consideration, and contained full covenants of warranty; and Wilhite's deed to Posey, which was dated the 8th February, 1872, recited the same consideration, and contained the usual covenants of warranty. The defendant Posey testified, also, that, at the time of said alleged tender and offer to redeem by plaintiff, he had made valuable improvements on the lands, of the value of \$25, and that plaintiff did not offer to pay him the value of said improvements. The defendant introduced evidence, also, that said Philemon Bradford was in possession of said lands at the time of said sale under execution, was a citizen of Alabama, and the head of a family; and that after the levy of said execution, and before the sale by the sheriff, said Bradford duly made claim of said land as his homestead exemption, by affidavit in writing in due form of law, which he delivered to the sheriff before the sale under said levy; that the plaintiff was present, by his attorney, at said sheriff's sale, and that said lands were, at the time of said sale, worth \$500. The defendant then introduced said James H. Vandegrift as a witness, who testified, that he took peaceable possession of said lands immediately after his purchase at the sheriff's sale, and sold and conveyed to said Posey on the 4th August, 1872, and put him in possession. The plaintiff then testified, in rebuttal, that he asked said Posey, at the time of said tender and offer to redeem, if he had made any improvements on the lands since and during his possession, and that

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said Posey answered the question in the negative. Plaintiff introduced said James Foreman also, who testified, in rebuttal, that said Posey told plaintiff, at the time of said tender and offer to redeem, that he had not made any improvements on the lands." It was shown, also, that the defendant Williams was the tenant of Posey, and had agreed, without the knowledge of Posey, to hold as the tenant of the plaintiff.

"This was all the evidence; whereupon, the court charged the jury, *ex mero motu*, as follows:

"1. Notwithstanding the plaintiff in this action was also the plaintiff in the judgment under which the lands were sold by the sheriff to said Vandegrift, yet he had the legal right to redeem said lands from said Vandegrift, and also from Posey, Vandegrift's vendee.

"2. That if the jury believed, from the evidence, that the plaintiff, within two years after the sheriff's sale under execution, offered to redeem the lands from said Posey, he being then in possession as the vendee of the purchaser at said sale, by tendering him \$50, the sum bid at said sale by said Vandegrift, with ten per cent. *per annum* thereon, and all lawful charges, and Posey refused to accept the money thus tendered; and if they further believed, from the evidence, that plaintiff credited his said judgment against Bradford with a sum equal to ten per cent. of the amount bid by said Vandegrift at said sheriff's sale,—this entitles plaintiff to recover in this action, if there was no other reason why he should not recover; and if there was no such other reason to the contrary, the jury must, under such evidence, find for the plaintiff.

"3. That the plaintiff, on offering to redeem from Posey, was not by law required to pay him the value of permanent valuable improvements made by him on the lands while in his possession: that, to entitle him to recover in this action, it was only necessary for him to offer to pay the amount bid by Vandegrift at the sheriff's sale, ten per cent. thereon, and the costs of conveyance: that if Posey had made permanent improvements on the lands, he was required to inform plaintiff of the fact and value of such improvements, and demand payment for the same; whereupon, if the parties could not agree to the value of the improvements, each must appoint a referee to ascertain their value; but that a refusal by plaintiff to pay for such improvements, before the amount was settled or agreed on, did not destroy nor prevent his right to recover in this action.

"4. That the plaintiff was allowed by the statute two years, from and after the sheriff's sale, in which to redeem the lands, and was allowed three other years, after the offer



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to redeem, to bring his action of unlawful detainer against the party in possession; and that if the jury believe, from the evidence, that this action was brought within three years after the plaintiff offered to redeem the land, the action is not barred by the statute of limitations, although the defendant may have had more than three years continuous and uninterrupted possession of the land next preceding the bringing of the action.

“The defendant excepted to each of these charges, and requested the court, in writing, to instruct the jury as follows: ‘If the jury believe, from the evidence, that Bradford, the defendant in execution, after the levy, and before the sale, claimed the lands by affidavit as exempt from sale under execution, being the head of a family, and residing on the lands as a homestead; and further, that said Bradford, before the sheriff’s sale, and after such claim of exemption was interposed, conveyed said lands, or his possession of the same, to Wilhite, the vendor of said Posey; then no title passed by the sheriff’s sale to Vandegrift, and plaintiff could not redeem the lands, and hence he can not recover in this action.’ The court refused this charge, and the defendant excepted.”

The charges given by the court, the refusal of the charge asked, and the rulings of the court on the evidence, as above stated, are now assigned as error.

L. F. BOX, with whom was JOHN W. INZER, for appellant.

1. The plaintiff had no right to redeem the land, under the same judgment under which he had sold it. He should have bought the land himself at the sheriff’s sale, or made it bring the amount of his judgment. By the sheriff’s sale, his lien on the land was destroyed; and it can not be again made liable, unless it again comes into the hands of his debtor. The redemption law of 1842 expressly gave him the right of redemption, when his judgment was unsatisfied by the sale; but the present statute, if not expressly, by necessary implication takes away the right, by putting him on the footing of other judgment creditors only when he becomes the purchaser at his own sale; and public policy, as declared by the statute, to prevent the sacrifice of the real estate of a helpless debtor, requires this construction.—Clay’s Digest, 503, § 5; Rev. Code, § 2517; *Freeman & Warren v. Jordan*, 17 Ala. 500; *Freeman on Executions*, 529, § 317; *Herman on Executions*, 438. The right of redemption is strictly statutory, and it can not be extended by judicial construction.

2. Permanent valuable improvements are a part of the law-

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ful charges, which the party desiring to redeem must pay, or offer to pay.—Rev. Code, § 2519; *Johnson v. Nabring*, 50 Ala. 392.

3. The fourth charge of the court, in effect, extended the statute of limitations from three to five years. The statute must be strictly construed.—*Gardner v. Stevens*, 2 Amer. 700, and authorities there cited; Angell on Lim. §§ 23, 29, 485–88. The statute begins to run against the plaintiff from the time when he may bring his action, or may perform the act on which his right of action depends. The sheriff's sale was made on the 2d October, 1871, while the offer to redeem was in July, 1875, more than two years afterwards.

4. Nothing whatever passed to the purchaser at the sheriff's sale. The defendant had made affidavit, and done every thing that he was required to do, to perfect his right of homestead exemption, before the sale; and this homestead exemption was lawfully conveyed to Wilhite, who sold and conveyed to Posey. As nothing passed by the sheriff's sale, there was nothing to redeem.

BRICKELL, C. J.—The first statute authorizing the redemption of real estate, sold under legal process, decree of a Court of Chancery, a mortgage, or a deed of trust, was enacted in 1842; and the right of redemption was limited to the debtor, and to his *bona fide* creditors. Not long after its enactment, it was decided, that the term *creditors* did not embrace creditors at large, but only such creditors as had reduced their debts or demands to judgment.—*Thomason v. Scales*, 12 Ala. 309; *Br. Bank Mobile v. Furniss*, 12 Ala. 367. It was expressly declared, that the plaintiff in execution, whose judgment was not satisfied by a sale of the lands, should be entitled to redeem from the purchaser.—*Freeman v. Jordan*, 17 Ala. 500. The present statute confers the right of redemption on the debtor, and on "all judgment creditors of the debtor, who, without fraud or collusion, had obtained such judgment before the sale of the land, or within two years thereafter, except by confession of the debtor."—R. C. § 2513. On the plaintiff in execution, whose judgment is unsatisfied by a sale of the lands, the right of redemption is not now conferred in express terms. It is insisted that, in the absence of such provision, he has not such right, because the sale of the lands removed from them the lien of the execution, as to the purchaser, and it can not attach again, unless the defendant in execution subsequently acquires an estate in them subject to levy and sale. The correctness of this proposition we shall not discuss; for we are convinced, the true construction of the present statute is, that the judgment

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creditor, whose judgment is unsatisfied by a sale, if his judgment was not obtained by confession, is embraced, and was intended to be embraced, by the general term "*all judgment creditors of the debtor.*"

2. An established rule of construction of the Code is, that in its adoption the legislature is presumed to have known the judicial construction which had been placed on former statutes; and the substantial re-enactment of such statutes is an adoption of that construction. Again, in its construction, the manifest purpose to express in general words the substance of former statutes, must be borne in mind; and from the omission of special words found in former statutes, embraced by the general words, an intention to change former statutes will not be implied. It is obvious that, in the adoption of the present statute, the legislature had in view not only the former statute, but the judicial construction it had received. Whatever changes it was proposed to make, either in the statute, or in its construction, are made in express terms, and not left to inference. The statute now employs the term "*judgment creditors,*" in the place of the term "*bona fide creditors,*" which had been construed to embrace only judgment creditors. The former statute was silent as to whether the creditor must have had judgment at the time of the sale, or whether if he obtained judgment subsequently, before the expiration of the two years, he could redeem. Subsequent, as well as prior, or existing judgment creditors, were declared entitled to redeem.—*Pollard v. Taylor*, 13 Ala. 604. The statute now, in express terms, embraces both classes of judgment creditors. A creditor obtaining judgment by confession had the right of redemption under the former statute.—*Couthway v. Berglaus*, 25 Ala. 393. The statute now, in express terms, excludes him; and this is the only change of judicial construction, which is expressly made. The present statute evidently intends to enlarge, rather than narrow (except in the particular instance of creditors obtaining judgment by confession), the right of redemption. A child, to whom the parent had conveyed the lands, may redeem. The executor or administrator of the debtor, or of a judgment creditor, is entitled to redeem.—R. C. §§ 2518, 2521.

We cannot doubt, if there had been an intention to change the former statute, so as to take from the judgment creditor, whose judgment remains unsatisfied by a sale of the lands, the right to redeem from the purchaser, it would have been expressed clearly, as was the change in reference to creditors having judgments by confession. The words of the statute, "*all judgment creditors,*" in their natural import embrace



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every judgment creditor. These are followed by words of exclusion of particular judgment creditors, and the exception thus made can not by construction be enlarged. The New York authorities, referred to in Freeman on Executions, § 317, depend on a statute, which provides that a plaintiff, under whose execution any real estate shall have been sold, shall not be authorized to redeem from the purchaser.—*Ex parte Paddock*, 4 Hill, 544.

The purpose of the statute is to prevent the sacrifice of real estate at forced sales under judicial process or decrees, or mortgages, or deeds of trust, and to afford the debtor, or his creditors, in payment of his debts, the advantage of any increase in the value of the lands, within the statutory period. Personal benefit to the creditor is not intended, except so far as it is in relief of the debtor. The evil which the statute proposes avoiding occurs, or may occur, at any of the sales to which the statute refers. The relief of the debtor, it may be, can be afforded by no other creditor, than the one under whose judgment the land was sold. The operation of the statute would be circumscribed, and its efficiency to accomplish the purposes for which it is intended would be lessened, if the creditor under whose judgment the land is sold was excluded from the right of redemption. If it was his benefit the statute was intended to secure, it would, perhaps, be just to say he should have bid more, and compelled the satisfaction of his judgment, or have become the owner of the land. But it is the benefit of the debtor, whose land is subjected to forced sale, the statute regards, and whatever of benefit enures to the creditor is for the relief of the debtor, and in satisfaction of the demand against him.

3. The third instruction given by the court is erroneous. A person offering to redeem must pay, or offer to pay, for valuable improvements made by the purchaser while in possession. An offer to pay the purchase-money, ten per cent. *per annum* thereon, and the costs of conveying, is not sufficient. He is not entitled to demand of the purchaser a conveyance, nor does the title vest in him by force of the statute, unless he offers to pay "all lawful charges;" which, it is manifest, embrace not only the costs of conveying, but the value of all permanent improvements made by the purchaser. The term may embrace other charges and claims, and we have no purpose now of indicating what other charges than the value of permanent improvements it may embrace. Payment of these is contemplated, and the party offering to redeem should inquire of the purchaser, or whoever may be in possession, and ascertain whether any, and what improvements have been made, and the value claimed

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for them. It is then the duty of the purchaser, or whoever has succeeded to the possession, to inform him fully of the character and value of such improvements; and if the parties cannot agree as to the character of the improvements, whether they are permanent, enhancing the value of the lands, or as to the value, referees must be nominated.—R. C. § 2519. Generally, the person offering to redeem will be uninformed as to the character and value of the improvements the purchaser may have made, or as to the fact of improvements having been made. His duty is performed, when his offer clearly indicates a willingness and readiness to pay for such improvements, on being informed of their character and value, and on being satisfied that they are permanent. Good faith and fair dealing must be observed by each party: the right of redemption must not be embarrassed by the want of it on the part of the party in possession; nor must the person offering to redeem seek a redemption on any other terms than are expressed in the statute. When a willingness and readiness to pay for improvements is indicated by the offer to redeem, then it is the duty of the purchaser, or party of whom redemption is claimed, to give full information of his claim; and if he fails or refuses, the offer becomes sufficient. It is proper to say, in view of some of the evidence found in this record, that if there is a general offer to redeem, and the right of redemption is denied, the party offering to redeem will be excused from any particular inquiry as to a claim for improvements.

4. The debtor, or a judgment creditor, complying with the statute, if redemption is refused, may maintain an action of unlawful detainer for the recovery of possession.—R. C. §§ 2512, 2516. The limitation of this action is three years; but such limitation will not commence running until the right of action accrues.

5. All that the purchaser is required to do, is to convey the title acquired by his purchase at the judicial sale, or the sale under a mortgage or deed of trust. Any other right or title he may have acquired, or any independent right and title he may hold, is not affected by the redemption, nor by the conveyance he is required to make.—*Weathers v. Spear*, 27 Ala. 455. If he has entered into possession under his purchase, he must surrender it when a redemption is made, or on a proper offer to redeem. The purpose of the statute is, that the debtor, if he exercises the right of redemption, shall be restored to the right and possession he had at the time of the sale; and that the creditor redeeming shall be remitted to the right and possession the purchaser from whom he redeems acquired by his purchase. A redemption

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cannot be resisted because the purchaser may subsequently have acquired a title superior to that obtained at the judicial sale, or sale under mortgage or deed of trust; nor can the purchaser, who enters under such sale, resist the surrender, or the recovery of possession, because of such title. When the debtor is restored to the possession he was compelled to relinquish, or the creditor is remitted to the possession the purchaser acquired, if the purchaser has a superior title, he may assert it by appropriate remedy for the recovery of possession. Whether the judgment debtor had a homestead in the premises, and whether his right thereto was affected by the sheriff's sale,—and whether the conveyance under which Posey claims the lands conveys the better title, are not questions which arise in the present action. The inquiry is not into the title, but the sale by the sheriff, the entry into possession under that sale, and whether there has been, in compliance with the statute, an offer to redeem, which was refused. The facts existing, the statute casts on the purchaser, or his tenant, the duty of surrendering possession; and if they fail, subjects them to an action of unlawful detainer.

For the error pointed out, the judgment is reversed, and the cause remanded.

## Bradley v. Northern Bank of Alabama

*Action on Bill of Exchange, against Indorser.*

1. *Computation of time, on bill payable ninety days after date.*—A bill of exchange, dated the 13th October, and payable ninety days after date, falls due on the 11th January next, and is properly protested on the 14th January.

2. *Seal; what constitutes.*—Although wax is better adapted than any other substance to receive and retain the impression of a seal, and was in ancient times used almost exclusively for that purpose, yet the seal may be stamped or impressed on the paper itself. In this case, "looking at the original protest, seventeen years after it was made, and finding upon it a distinct circular outline impression of a seal, with an indented inner edge, or rim, and within this a number of stars in a circular row, and between them and the edge the legend, "Notary Public, New Orleans, La.,—this, with the signatures," the court holds, "is sufficient to establish the authenticity of the protest, in the absence of all evidence to create any suspicion of its genuineness."

3. *Notary's certificate of presentment, demand, non-payment, and notice.*—The statute which makes a notary's certificate "of the presentment for acceptance, or demand of payment, or protest for non-acceptance or non payment, of any instrument governed by the commercial law," etc., "evidence of the facts contained in such certificate" (Rev. Code, § 1089; Code of 1876, § 1336), although improperly placed in the chapter which relates to the appointment, etc., of



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notaries public in this State, equally applies to the certificates of foreign notaries, when offered in evidence in the courts of Alabama.

4. *Presentment.*—The certificate of a notary, stating that he presented the bill "at the office of the drawees, to Mr. M., a competent clerk, no member of the firm being therein, and, demanding payment, was answered it could not be paid," shows a sufficient presentment.

5. *Foreign bills; proof of, by printed volume.*—A printed volume, whose title-page is as follows: "Acts passed by the second Legislature of the State of Louisiana, at its second session, held and begun at the town of Baton Rouge, on the 15th day of January, 1855. Published by authority. New Orleans: Printed by *Annie La Sere*, State Printer," shows on its face that it was printed by proper authority (Code of 1876, § 3045), and is therefore evidence of its contents without further proof.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by the Northern Bank of Alabama, a corporation chartered under the laws of this State, against Joseph C. Bradley; was commenced on the 18th August, 1871; and was founded on a bill of exchange for \$8,550, drawn by Jordan & Moore, at Maysville, Alabama, October 13, 1860, on Bradley, Wilson & Co., New Orleans, Louisiana, payable ninety days after date, to the order of Daniel B. Turner, and indorsed by said Turner and the defendant. The complaint contained but one count, which was in the form given in the Code, "by indorsee against indorser," page 701. The defendant pleaded—1st, *non assumpsit*: 2d, "that said bill of exchange was not duly protested;" 3d, "that due notice of protest was not given to him;" and issue was joined on these pleas. On the trial, as the bill of exceptions states, the plaintiff offered in evidence the bill of exchange on which the action was founded, "and, in connection therewith, offered to read to the jury, as evidence, a paper purporting on its face to be a protest, with a certificate thereon written; a copy of which, except the seal and signature of the notary," is thus set out:

"United States of America, ) By this public instrument of  
State of Louisiana.        { protest, be it known that, on  
the 14th day of January, in the year one thousand and eight  
hundred and sixty-one, at the request of Mortimer Belley,  
cashier, holder of the original draft, whereof a true copy is  
on the reverse hereof written, I, Walter Hicks Peters, a notary  
public in and for the city and parish of New Orleans,  
State of Louisiana aforesaid, duly commissioned and sworn,  
presented said draft at the office of the drawees, to Mr. McLarin, a competent clerk, no member of the firm being  
therein, and, demanding payment, was answered that it could  
not be paid. Whereupon, I, the said notary, at the request  
of the aforesaid, did protest, and, by these presents, do publicly  
and solemnly protest, as well against the drawer or

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maker of said draft, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interest, suffered or to be suffered for want of payment of said draft. This done and protested in the presence of *Placide Bienvenu* and *Thomas J. Castell*, witnesses.

"*T. J. Castell*,

"WALTER H. PETERS, Not. Pub."

"*P. Bienvenu*."

"A true copy of the original on file in my office. In testimony whereof, I grant these presents, under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written." (Here follows a copy of the bill of exchange, with the several indorsements thereon.) "I, the undersigned, notary, do hereby certify, that the parties to the draft, whereof a true copy is above written, have been duly notified of the protest thereof, by letters to them by me written and addressed, dated on the day of the said protest, and served on them respectively in the manner following to-wit: notices addressed to D. B. Turner, Joseph C. Bradley, and Theo. Lacy, cashier, respectively, at Huntsville; and to Jordan & Moore at Maysville, Alabama, and all put in the post-office in this city, on this day of protest, postage prepaid. In witness whereof, I grant these presents, under my hand and seal of office, at the city of New Orleans, on this 14th day of January, A. D. 1861."

"Said original paper," the bill of exceptions recites, "purporting to be a protest, the presiding judge deems it necessary and proper should be inspected in the Supreme Court, and it is therefore made a part of this bill of exceptions;" and it was so exhibited to this court. "In connection with said instrument purporting to be a protest, the plaintiff introduced a book, entitled as follows: '*Acts passed by the second Legislature of the State of Louisiana, at its second session, held and begun at the town of Baton Rouge, on the 15th day of January, 1855. Published by authority. New Orleans: Printed by Amile La Sere, State printer, 1855;*' and read from an act therein contained, commencing on page 47, entitled 'An act relating to bills of exchange and promissory notes,' the 7th and 8th sections of said act;" which, as copied in the bill of exceptions, are in these words:

"SEC. 7. *Be it further enacted, etc.,* That notaries and parish recorders shall keep a separate book, in which they shall transcribe and record, by order of date, all the protests by them made, with mention made of the notices which they shall have given of the same to the drawers or indorsers thereof, together with the names of the drawers or indorsers, the date of the notices, and the manner in which they were served or forwarded; which declaration, duly recorded, under

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the signature of the notary public or parish recorder, shall be considered and received, in all courts of this State, as a legal proof of the notices.

"SEC. 8. *Be it further enacted*, That all notaries, or persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, or orders for the payment of money, to make mention of the demand made upon the drawer, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand, and by certificate, added to such protest, to state the manner in which any notices of protest were served or forwarded; and whenever they shall have done so, a certificate shall be evidence of all matters therein stated."

"The plaintiff then proved that, from the date of said bill of exchange, to the institution of this suit, the said Joseph C. Bradley had resided at Huntsville, Alabama, and that Huntsville was his post-office. This was all the evidence offered by the plaintiff. Thereupon, the defendant moved to exclude from the jury said sections read from said book, as above copied, because it did not appear that the same purported to be published by authority of the State of Louisiana." (By consent of counsel, entered of record in this court, the book referred to was filed with the clerk, and submitted to the inspection of the judges.) "The defendant moved, also, to exclude from the jury the aforesaid paper purporting to be a protest, because there was no seal of the notary public, who purported to protest said bill, attached to or upon said protest; and because what appears on said protest as a seal does not show that it is the seal of the notary whose name appears in the face of the protest; and because the signature attached to said protest is illegible, and cannot be deciphered as the signature of the notary printed in the body of the protest; and because the statement by the notary, in his certificate, that McLarin was a competent clerk of the drawees, is not, of itself, evidence that said McLarin was the clerk of the drawees; and because the certificate does not sufficiently show that said bill of exchange was presented for payment at the place of business of the drawees; and because said certificate does not show that said bill was presented in business hours; and because said certificate is not, of itself, evidence that the notice was given to the defendant, of the dishonor of the bill, and of its protest for non-payment; and because said protest is the protest of a foreign bill of exchange, made by a foreign notary, and the certificate therein embodied is not, of itself, such notice to the indorser as would bind him; and because said protest



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shows that said bill was prematurely protested; and because the recitals in said protest are not, of themselves, evidence that McLarin was an authorized agent or clerk of the drawees, to whom said bill could be presented for payment. The court overruled each and all of these objections, and refused to exclude said evidence, or any part thereof, from the jury; to which several rulings, each, the defendant excepted. Thereupon, at the request of the plaintiff, the court charged the jury, that, upon the evidence, they must find a verdict for the plaintiff; to which charge, also, the defendant excepted."

The charge to the jury, and the several rulings of the court on the evidence, as above stated, are now assigned as error.

L. P. WALKER, for the appellant.—1. The bill of exchange was prematurely protested. From the 13th October, the day of its date, to the 14th January following, the day on which it was protested, and including that day, there were only ninety-three days. Three days of grace are to be allowed, exclusive of the day on which the bill falls due, and including the last day of grace.—Edwards on Bills, 486, 489, top; Story on Prom. Notes, §§ 21, 217. By this rule, the bill should have been protested on the 15th January.

2. The protest is fatally defective, for want of the notary's official seal. Although wax was the only material formerly used, to receive and retain the impression of the seal, it is admitted that any other substitute, capable of receiving and retaining the impression, may now be used. But, whatever material may be used, it must receive and show the impression, so that the identity of the seal may be recognized; for it is the seal which authenticates, and not the substance on which it is impressed, and it is an essential part of the protest. On a critical examination of this supposed seal, aided by magnifying lenses, the only discernable words are: "*Notary Public, lea, La.*" This utterly fails to establish the requisites of a notary's seal, either at common law, or under the statute.—5 Cranch, 535; 6 Serg. & R. 484; 3 Wendell, 173; 4 Blackf. Ind. 158; 13 Howard, 474; 19 N. H. 558; 32 N. H. 446; 5 John. 239; 21 Pick. 417; 2 Hill, N. Y. 231; 49 Ala. 242.

3. Apart from the defectiveness of the seal, the signature to the protest is illegible, and can not be deciphered and identified as that of Walter Hicks Peters, whose name is printed in the body of the protest. It is a hieroglyph simply, and requires oral evidence to explain it.—49 Ala. 242, and authorities there cited.

4. The certificate is not evidence of a notice of protest,  
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as therein stated. Without the aid of a statute, the giving of notice is no part of the province or duty of a notary, and his certificate, authenticated by his seal, is proof only of the drawee's refusal to accept or pay the bill.—*Bank of Rochester v. Gray*, 2 Hill, N. Y. 231; 6 Whart. Penn. 406, 415; *Kirtland v. Wanzer*, 2 Duer, 278. The Alabama statute (Rev. Code, § 1089) cannot aid the certificate; because, as shown by the whole chapter of which it forms a part, that statute applies only to notaries of the State of Alabama.

5. Even if the statute applies, it cannot supply the defects of this certificate, which states a presentment to McLarin, a "competent clerk." This is not one of the facts which a notary is authorized to certify, and it does not show a sufficient presentment.—*O'Connell v. Walker*, 1 Porter, 263; *Castles v. McMath*, 1 Ala. 356; 18 La. 680; 3 Hill, N. Y. 53; *Stewart v. Allison*, 6 S. & R. 328; 4 How. Miss. 569; 3 McL. C. C. 481; *Hildebran v. Turner*, 5 How. U. S. 69; 4 How. U. S. 262; Story on Bills, § 279.

6. The Louisiana statute was not admissible as evidence, because it does not on its face purport to be published by authority of that State. If admissible, it could have no extra-territorial operation, nor affect the rights or liabilities of the defendant in this suit.

CABANISS & WARD, *contra*.—1. A seal stamped on paper, instead of wax or wafer, is sufficient.—*Pillow v. Roberts*, 13 How. U. S. 472. A slight impression, after the lapse of many years, will be presumed to be the seal.—*Highway v. Pendleton*, 15 Ohio, 735.

2. The notary's certificate shows a presentment at the office of the drawees, and that is sufficient—*Philips v. Poindexter*, 18 Ala. 579; *Br. Bank at Decatur v. Hodges*, 17 Ala. 42; *Stainback v. Bank of Virginia*, 11 Gratt. 260; *Hildebran v. Turner*, 5 How. U. S. 69; *Wiseman v. Chiapella*, 23 How. 368.

3. The notary's certificate is sufficient evidence of notice, as therein recited.—Rev. Code, § 1089; 1 Brickell's Digest, 267, § 235; *Boggs v. Br. Bank at Mobile*, 10 Ala. 295. There is nothing in the language of the statute, or in its object, to restrict it to notaries holding office under Alabama appointments; and its purpose and intention cannot be thus restricted, and thereby partially defeated, by being misplaced in the Revised Code. Similar statutes exist in nineteen of the States; in ten of which, they are made expressly applicable to foreign notaries, while the others speak of notaries generally. Of these general statutes, in Maine and New Hampshire they are held to include foreign notaries; and in New York only are they held applicable to none but those of

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domestic appointment, as in the case cited from 2 Hill, 227, and 2 Duer, 278. The last case is criticized in 7 Barb. 143, and the ground on which the decision was placed was met and obviated in this case, by the introduction of the Louisiana statute.

MANNING, J.—The calculation by appellant's counsel, of the day when the bill of exchange sued on in this cause became payable, is not correct. The 11th day of January, 1861, and not the 12th, was the term of the period of ninety days after the 13th of October, 1860, the day of the date of the bill; and the third and last day of grace, when the bill should have been paid or protested, was the 14th day of January, the day when the protest was made.

2. No adhesive substance is probably so good as wax, to receive, retain, and distinctly exhibit the figures and legend, or other devices, upon a seal, official or private; and wax was used for that purpose, when an instrument was sufficiently executed for delivery by the seal alone of the party executing it. But, when his signature became as essential, and even more essential than the seal, wafers largely, and perhaps generally, took the place of wax; and now, instead of making an impression of the seal upon any adhesive substance affixed to the paper, upon which the intention or act of the party is declared in writing, the practice has become general to have official seals applied, with a strong pressure, upon the paper itself. And the opinion is expressed, in *Pillow v. Roberts* (13 How. 473), that the impression thus made is "less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax." This is, doubtless, a principal reason, why the practice of sealing an instrument generally prevails. Counsel for appellant properly admit, that an instrument may be sufficiently sealed by such an impression of the seal upon the paper; but they insist, that it does not appear in this case that the protest objected to was so sealed. With the advantages, above mentioned, of having the impression thus made upon the paper, we must take the disadvantages. Differing with Justice Grier in the case above cited, we think that such an impression is not, generally, so well defined, as it would be on wax, and that, after a long time, it is apt to grow less distinct; especially if the paper be not of a quality good for retaining it. Looking at the original protest, brought here to be inspected in this cause, seventeen years after it was made, we find upon it a distinct circular outline impression of a seal, with an indented inner edge, or rim, and within this a number of stars in a circular row, and between them and



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the edge the legend, "*Notary Public, New Orleans, La.*" This, with the signatures, we think sufficient to establish the authenticity of the protest, in the absence of all evidence to create any suspicion of its genuineness. The certificate on the other page of the protest, on the same leaf, is authenticated in the same manner, and the circuit judge did not err in permitting them to come in as evidence.—See a similar ruling, in *Heighway v. Pendleton*, 15 Ohio, 735.

3. In *Boit & McKenzie v. Carr* (in MS), the suit was against the indorser of a promissory note, payable at a bank in Savannah, Georgia; and we held that the protest there made was evidence against defendants, of the presentment for payment, non-payment, and notice thereof to him, by virtue of section 1089 of the Revised Code of 1867. Although, upon the compilation of that Code, the matter of this section was placed in the chapter, and among the sections of the Code of 1852, which related to the appointment, qualification, and duties of notaries public of this State; yet its more appropriate place was the chapter "On Evidence." It is the substance of a statute of 1854; and according to the general and uniform practice this enactment has been regarded by the bench and bar of this State, as relating to the acts of foreign notaries, as well as to those who held their commission from the governor of Alabama.—See 1st Brick. Dig. 267, § 235. No good reason can be assigned, why it should not be so understood. The certificate of a notary public of Louisiana is, therefore, receivable in our courts, as evidence of the notices he had given of the protest of a bill of exchange, upon which suit is brought here.

4. It is further objected that, in the present instance, the presentment for payment was defective. The protest shows, that the notary presented it at the office of the drawees, "to Mr. McLarin, a competent clerk, no member of the firm being therein; and demanding payment, was answered that it could not be paid." This court held, in *Phillips v. Poin-dexter* (18 Ala. 580), in an elaborate opinion by PARSONS, J., in the case of a foreign bill of exchange,—a bill drawn in this State, upon drawees in Louisiana,—that the notary's certificate, that the person of whom he made the demand was the attorney in fact of the drawees, was *prima facie* evidence that he was so. See, also, *Stainback v. Bank of Virginia*, 11 Gratt. 260. It was sufficient, however, to show, as is done in this case, that the demand was made at the office of the drawees, and, they not being there, upon a person named by the notary, whom he found in the office.—*Branch Bank v. Hodges*, 17 Ala 42, and authorities there cited.

5. A statute, contained in a book of 500 pages, of what

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purports to be the "Acts of the Legislature of Louisiana," printed on opposite pages in the English and French languages, was introduced as evidence, against the objections of appellant. Each act is authenticated by signatures, purporting to be those of the speaker of the house of representatives, the president of the senate, and the governor of Louisiana, respectively; and according to the title page, they are acts passed by the "Legislature of the State of Louisiana, at its second session, held and begun in the town of Baton Rouge, on the 15th of January, 1855. Published by authority. New Orleans: printed by Emile La Sere, State Printer, 1855." The objection to its admission was, that it did not appear, on the face of the book, that it was printed by authority of the State of Louisiana. It seems to us that this does (in the language of § 2693, R. C.) appear "upon the face of the book."

We find no error in the record. Let the judgment be affirmed.

BRICKELL, C. J. not sitting, having been of counsel.

## Masterson v. Matthews.

### *Action on Judgment, and on Detinue Bond.*

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1. *Judgments rendered by incompetent judge; validity of.*—Judgments rendered by a judge *de facto*, whose election or appointment was afterwards declared unconstitutional and void, are nevertheless valid and binding, and are not reversible on account of his incompetency.

2. *Presumption as to pleadings.*—When the record recites that the court sustained a demurrer to the whole complaint, for a misjoinder of counts, and that the defendant then demurred to the second count, and, his demurrer being overruled, he then filed pleas, on which issue was joined; this court will presume that, after sustaining the demurrer to the whole complaint, the court gave the plaintiff leave to amend, and that he amended his complaint by striking out the first count.

3. *Action on judgment; sufficiency of complaint.*—In an action on a domestic judgment, it is sufficient to aver the rendition of the judgment, the court by which it was rendered, the date, names of parties, and amount; and it is not necessary to aver that the court had jurisdiction, nor that the judgment remains of full force, unreversed, and unsatisfied.

4. *Action on replevin bond.*—An action at law may be maintained on a replevin bond, given in an action of detinue, although the bond, when properly indorsed and returned forfeited (Code of 1876, § 2945), has the force and effect of a judgment: the statutory remedy is merely cumulative.

FROM the Circuit Court of Lawrence.  
Tried before the Hon. W. B. Wood.

[Masterson v. Matthews.]

This action was brought by H. B. Matthews and Abbie A. Matthews, against B. O. Masterson, and was commenced on the 11th March, 1875. The complaint contained three counts; the first being a count in trover, for the alleged conversion of three bales of cotton; and the second being in these words: "The plaintiffs claim of said defendant the further sum of \$120.80, due by judgment recovered against him, in the Law and Equity Court of Lawrence county, Alabama, on the 5th February, 1874, with the interest thereon." The third count was for the breach of the condition of a replevin bond, which was set out in full, and which was executed by said defendant, with others, as sureties for one Geddings, who was the defendant in an action of detinue, at the suit of these plaintiffs, in said Law and Equity Court of Lawrence county; in which action, it seems, the judgment was rendered, on which the second count is founded. The other pleadings, and the rulings of the court in reference to them, are thus stated in the judgment-entry: "Came the parties, by their attorneys, and defendant demurs to plaintiffs' complaint, and for cause of demurrer assigns a misjoinder of counts, in this—that the first count is in trover, while the second is in debt on judgment, and the third is on bond for breach thereof; which demurrer being heard, the same is sustained. Thereupon, defendant demurs to the second count of said complaint, and for cause shows that the same is not sufficient in law, in this—that it does not appear that said supposed judgment is wholly unsatisfied, and remains in full force and virtue, and wholly unreversed, and that the court in which the same was rendered was a valid court. Thereupon, the court overruled the demurrer to the second and third counts of said complaint, and thereupon the defendant pleaded to said complaint—1st, former recovery; 2d, payment; 3d, the general issue to the whole complaint, and to each count separately, with leave to give in evidence any matter that may be the subject of a special plea,—all in short by consent; on which pleas issue is joined by the plaintiffs," &c.

On the trial, as the bill of exceptions shows, the plaintiffs offered in evidence the bond set out in the third count, with the indorsements thereon. Said bond, which was dated the 5th December, 1873, recited that the plaintiffs in this action had commenced an action of detinue, in the Law and Equity Court of Lawrence county, against J. C. Geddings, for three bales of cotton, which the sheriff had seized, and of which said Geddings had regained the possession by executing said bond; and was conditioned as follows: Now, if the said J. C. Geddings is cast in said suit, and, within thirty days after



[Masterson v. Matthews.]

judgment, delivers the property aforesaid to the plaintiffs, and pays all costs and damages which may accrue from the detention thereof, then this obligation to be void." The sheriff's indorsement on said bond was without date, and was in these words: "There was judgment obtained in the Law and Equity Court in this case, against the defendants; execution issued, and placed in my hands, which was conditionally settled, and the money was as good as in hand at the time the court was to meet. The legislature, or the Supreme Court, decided the court unconstitutional; and I was then notified by H. B. Matthews to hold the money, and not pay it over to any one, until I heard from him. The cause of him telling me this was, that J. W. Falk and J. C. Baker claimed that I must pay the money over to them. On the same day, or day after, Mr. Masterson ordered me to hold the money—that the court was not constitutional, and that he was not willing to pay the money by order of a court that the Supreme Court had decided unconstitutional. Before this time, I had paid an order for \$20 from Masterson to Dr. McMahon. The cotton herein mentioned was never returned to me." The bill of exceptions thus continues: "The plaintiffs offered, at the same time, evidence tending to show that said bond had been given in the detinue suit therein named, and had been forfeited, and returned into said court by the sheriff, and indorsed by him 'forfeited' as required by law. To the introduction of this evidence the defendant objected, but the court overruled the objection, and permitted the evidence to go to the jury; to which ruling and decision the defendant excepted."

"The plaintiffs offered evidence, also, of the said detinue suit in which said bond was given, under which the sheriff took said three bales of cotton into his possession, and the replevy thereof by said Geddings, as shown by said bond. It was shown, also, that the plaintiffs in said suit recovered said cotton on the trial of said detinue suit. The value of said cotton was proved, and that it was not delivered to the sheriff, nor to the plaintiffs, as required by the condition of said bond. It was shown, also, that there was no judgment in any court against said Masterson, save and except the forfeiture of said bond, which was the same set out in plaintiffs' complaint on a bond. This being all the evidence before the jury, the defendant moved the court to exclude said bond from the jury as evidence; which motion the court overruled and refused, and the defendant excepted. The court then charged the jury, that the judgment of the Law and Equity Court of Lawrence was not void; and that the forfeiture of said bond, and the return thereof by the sheriff

[Masterson v. Matthews.]

'forfeited', after a failure to deliver said cotton as required by the condition of said bond, gave said bond the force and effect of a judgment, and that the plaintiffs might recover upon the same in this suit. Thereupon, to both of said charges the defendant excepted, both to the first, and to the second, as given."

The errors now assigned are: 1st, "the overruling of the demurrer to the first count in the complaint;" 2d, "the overruling of the demurrer to the third count;" 3d, and 4th, the rulings of the court on the evidence, as shown by the bill of exceptions; and, 5th, the charges to the jury.

THOS. M. PETERS, with whom was E. H. FOSTER, for appellant.—1. "The demurrer to the first count was sustained, but overruled as to the second and third counts. The first count, however, is the only one that is not vicious; yet, being in trover, while the others are in debt, it made the whole complaint bad for misjoinder, unless that defect is cured by the statute. It certainly permits the plaintiff to plead over, and omit the defective count, or the joinder of incompatible causes of action."—7 Bac. Abr. 472; 1 *Ib.* 70; 1 Brickell's Digest, 24; 2 *Ib.* 332; *Wilkinson v. Mosely*, 30 Ala. 562; *Canal Co. v. Rowan*, 4 Dana, 605; Rev. Code, §§ 2637, 2811.

2. The second count is insufficient, and does not show a substantial cause of action. It does not allege that there was any judgment in favor of these plaintiffs, or any judgment at all against said defendant, rendered by said Law and Equity Court on the 5th February, 1874; nor in fact was there any such judgment, as the proof shows there was a judgment against Geddings alone. It is defective, also, because it does not allege that "said judgment remains in full force and effect, not reversed, satisfied, or otherwise vacated, and that plaintiffs have not obtained any execution or satisfaction of or upon said judgment," or other equivalent averments.—Rev. Code, §§ 2811, 2629; *Johnson v. Martin*, December, 1875; 1 Chitty's Pl. 103, 104; 2 *Ib.* 183-4; Tillinghast's Forms, 394.

3. The alleged judgment is a nullity. The Law and Equity Court of Lawrence was a court without a judge, and its proceedings were void.—*Ex parte Roundtree*, 51 Ala. 42; *Claunch v. Castleberry*, 23 Ala. 85; *Wilson v. Wilson*, 36 Ala. 655; *Heydenfeldt v. Towns*, 27 Ala. 423; *Wright v. Karsner*, 20 Ala. 446; *Cullum v. Casey & Co.*, 1 Ala. 351; *Garlick v. Dunn*, 42 Ala. 404.

4. The bond being forfeited, it had the force and effect of a judgment, on which an execution might issue. The bond was merged in, and extinguished by this statutory judgment,

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and no subsequent recovery could be had on it.—Rev. Code, §§ 2629, 2633, 2596; *Mason v. Eldred*, 6 Wallace, 231; *Garratt & Hill v. Logan*, 19 Ala. 344; *Anderson v. Dickson*, 8 Ala. 733; *Garnett v. Yoe*, 17 Ala. 74; *Watts v. Sheppard*, 2 Ala. 425.

5. The bond was not competent evidence under either count: as a bond it was extinguished, and as a judgment it was variant from that described in the second count.—Rev. Code, § 2596; 1 Brickell's Digest, 809, §§ 84, 85, 90, 93; 1 Greenl. Ev. §§ 50-51, 61, 63; 6 Wallace, 231; *Oakley v. Aspinwall*, 2 Sandf. 7; 13 Mass. 184; 1 Pet. C. C. 74; 1 Pick. 118.

6. The sheriff's indorsement on the bond did not show that it had been forfeited. The return was matter of record, and could not be shown by parol. Besides, there was a variance.—1 Greenl. Ev. §§ 50, 51; 1 Brickell's Digest, 809; 14 Ala. 354; 6 Porter, 447.

PHELAN & WHEELER, *contra*.—1. If the decision in *Ex parte Roundtree*, 51 Ala. 42, should be adhered to, it does not affect the validity of the judgments rendered by the Law and Equity Court of Lawrence. The presiding judge of that court was at least a judge *de facto*, if not *de jure*, and its judgments are valid.—*Mays v. Stoneum*, 2 Ala. 390; *Williamson v. Woolf*, 37 Ala. 298; *Heath v. The State*, 36 Ala. 173; *State v. Carroll*, 38 Conn. 449; 9 Amer. 409.

2. Even if the judgment should be held null and void, the defendant is nevertheless liable on his bond, and is estopped by it.—*Alston v. Alston*, 34 Ala. 24; *Sprowl v. Lawrence*, 33 Ala. 692; *Williamson v. Woolf*, 37 Ala. 298.

3. The charge of the court, then, as to the validity of the judgment, is, at most, error without injury, for which this court will not reverse.—*Moody v. McCown*, 39 Ala. 586; *Rigsby v. Norwood*, 34 Ala. 139.

STONE, J.—The act "To establish an inferior court of record in the town of Courtland, Alabama," approved January 2, 1872 (Pamph. Acts, 104), and the act to establish a similar court in the town of Decatur, approved December 17, 1873 (Pamph. Acts, 68), are indetical in their provisions. In *Ex parte Roundtree*, 51 Ala. 42, this court, in an able and satisfactory opinion, held that section 15 of the statute creating said court was unconstitutional. That section is in the following language: "That the judge of the fourth judicial circuit of Alabama shall be the judge of said Court of Law and Equity." No other clause of said statute was declared unconstitutional, and we are not aware of any sound argument that can be urged against the constitutionality of



[Masterson v. Matthews.]

the other provisions. We thus have the case of a court constitutionally created in all its appointments, save in the matter of the judge who is to preside over it: he was not constitutionally chosen.

In 1840, the legislature created the 10th judicial circuit, and elected to the judgeship of it a person who was constitutionally ineligible to hold the office. He presided for a time, and rendered judgments. An information in the form of a *quo warranto* was filed against him in this court, and he was ousted by the judgment of this court, on account of his ineligibility.—See *State, ex rel. v. Porter*, 1 Ala. 688. A question arose, whether the judgments, so rendered by him, were valid and binding. This court held them valid, remarking: “It is now too well settled, that the acts of a judge *de facto*, whose title to the office has not been adjudged insufficient, are valid and irreversible, to allow of serious controversy.”—See *Mays v. Stoneum*, 2 Ala. 390. We are unable to distinguish, in principle, between that case and this. The judgments of the Law and Equity Court of Lawrence, rendered before the decision of this court in the case of *Ex parte Roundtree* was announced, are valid and binding, and not reversible on account of the manner in which the presiding judge was chosen. He was a judge *de facto*.

Probably the most elaborately considered case on this question, is that of *The State v. Carroll*, 38 Conn. 449, decided in 1871. The court, in that case, quoted with approbation the following language: “If you find a man executing the duties of an office, under such circumstances of continuance, reputation, or otherwise, as reasonably authorize the presumption that he is the officer he assumes to be, you may submit to, or employ him, without taking the trouble to inquire into his title; and the law will hold his acts valid as to you, by holding him to be, so far forth, an officer *de facto*. If he has color of appointment, or election, and yet is not a good officer for the want of authority in the appointing power, or irregularity in exercising it, or because there was another lawful officer entitled to the office, or because the incumbent was ineligible, or had not qualified as the law required, or his term had expired, your case is made stronger by the color; but that kind of color is not essential to your protection, for you are not bound to inquire to see that it exists.”

We need not, and do not, go the full extent of the doctrine stated above. The wants of the case in hand do not require it. All we affirm in the present case is, that the judge of the fourth judicial circuit was, *de facto*, judge of the Law and Equity Court of Lawrence county, until the prohibition was

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awarded in *Ex parte Roundtree*.—See *Den, ex dem. v. Reddick*, 4 Ired. Law, 368; *State v. Alling*, 12 Ohio, 16; *Case v. The State*, 5 Ired. 1; *State v. Anone*, 2 Nott & McC. 27; *Taylor v. Shrine*. 2 Trud. S. C. 693.

2. This record is strangely obscure in the matter of the rulings on the demurrers. There was a general demurrer to the whole complaint, for misjoinder of counts. This was sustained by the court. This ruling, without amendment of the complaint, put the case out of court. Without any note of amendment, the record shows that defendant then demurred to the second count, assigning causes. It contains no demurrer to the third count. Yet, the judgment-entry affirms, the court overruled the demurrer to the second *and third* counts; and pleas were then interposed to the second and third counts, and issues joined on them. We feel it our duty to presume that, after the demurrer was sustained to the whole complaint, for the misjoinder of counts, the court gave plaintiffs leave to amend, which they did by striking out the first count. There being no demurrer to the third count, we need not consider its sufficiency.

3. The second count is sufficient. It affirms the recovery of a judgment, the court in which it was recovered, the date, parties, and amount. The court having been created, and its jurisdiction defined, by a public statute of Alabama, it was not necessary to aver the court had jurisdiction. The law gave it jurisdiction of the subject-matter; and if the judgment was open to any defense, that was a proper subject for a plea. So, it was not necessary to aver that the judgment remained of full force, unreversed, and unsatisfied. The law does not presume the reversal of a judgment, nor its satisfaction, except after the period of twenty years. Satisfaction and reversal are matters of defense.

4. Nor is it any defense to this action that, ordinarily, a replevin bond, given in an action of detinue, has the force and effect of a judgment, when properly indorsed and returned forfeited. This is but a cumulative, summary remedy, and does not take away the common-law right to sue on the bond.

Judgment affirmed.

[Ex parte Wallace.]

*Ex parte Wallace.**Petition for Mandamus to Circuit Court.*

1. *Rehearing after final judgment at law, on ground of surprise, &c. ; what petition must show.*—On application for a rehearing, or new trial, after final judgment at law, on the ground of surprise, accident, mistake, or fraud (Code of 1876, §§ 3161-66), the petitioner must show, not only that he had a good cause of action or defense, but that he can substantiate it on another trial, and that his failure to substantiate it on the former trial was without fault or negligence on his part; and these rules are applied with more strictness, where, as in this case, the cause had been pending for five or six years.

APPLICATION by petition, by William Wallace, for a writ of *mandamus* to the Circuit Court of Madison, Hon. L. WYETH presiding, to compel that court to grant a rehearing, or new trial, in a certain cause therein lately pending, wherein one James Henry was plaintiff, and said petitioner was defendant. The material facts are stated in the opinion of the court.

HUMES & GORDON, for the petitioner.

L. B. COOPER, *contra*.

MANNING, J.—Petition was presented, under section 2814, and those following, of the Revised Code, to the proper circuit judge, Hon L. WYETH, for *supersedeas* of an execution, and a new trial, in a cause in which one Henry obtained a judgment against petitioner, Wallace, in the Circuit Court of Madison county; and the prayer of the petitioner having been denied, this motion for a *mandamus* is made.

The petitioner alleged that he was sick at home, and unable to attend court, when the trial in the suit against him came on; and that the counsel who defended him were taken by surprise, without fault on their part, by putting trust in a witness summoned to testify for petitioner, who, before the trial began, told them he would prove a certain contract to have been made, and which petitioner declares, under oath, was made, but of which the witness, on the stand, denies all knowledge. The contract alleged is, that a mule, seized by the witness as a deputy sheriff, by virtue of an attachment in the cause against petitioner, was sold by the latter to the plaintiff, in full satisfaction of the debt for which that



[Ex parte Wallace,]

writ was issued ; while the witness deposed to an agreement between the parties, by which, to save cost of keeping the mule, and advertising a sale, the animal was sold by him, the deputy sheriff, for \$141, and that sum applied toward payment of the debt, in the year 1871.

The plaintiff, Henry, in his answer to the petition, and his attorney, by affidavit, also depose that this was the agreement which really was made ; while one Jamar, and petitioner's attorney prove, by their affidavits, that the witness told the latter, a short time before the trial began, that the plaintiff and petitioner agreed that the former should take the mule in payment of the debt.

The proceedings by the petitioner for a rehearing, made to the circuit judge, under the sections of the law before mentioned, are understood to be a substitute for a bill in a court of equity for a new trial, when an unjust judgment is rendered against the petitioner, without any fault or neglect on his part. In such a proceeding, the law is strict in requiring, not only a clear statement of a meritorious defense, which can be substantiated, against the judgment, but also allegation of the facts and circumstances which are relied on to show that the party complaining acted with due diligence, and is chargeable with no fault or neglect in not having had the matter of his defense completely presented at the trial.

In *French v. Garner*, a leading case in this court, "where relief against a judgment at law was sought, because of complainant's inability, on account of his own sickness, and that of his material witness, to attend court when judgment was rendered ; but the name of the witness was not disclosed, nor did it appear that all the facts material to the defense could have been established by him, nor was any reason shown for not having applied for a new trial at law,—a court of equity refused to interfere."—1 Brick. Dig. 607, § 403 ; 7 Porter, 549. A similar rule is applicable in a proceeding by petition under the statutes. "Although," says RICE, C. J., "the petition may show that the defendant was prevented from making his defense by surprise, accident, mistake, or fraud ; yet, if it shows nothing more, and fails to show that he was so prevented without fault on his part, it discloses no right to obtain a rehearing under the Code, or under any other law."—*White v. Ryan*, 31 Ala. 402 ; *Shields v. Burns*, 31 Ala. 535 ; *Elliott v. Cook*, 33 Ala. 490.

It is true that, in a proceeding of this sort, the petitioner will not be put to full proof of the facts upon which his defense in the original action depends ; but it should appear, by his petition, that he will be able to make good the defense on which he insists, and that he is free from any fault

[Moore &amp; McGee v. Burns &amp; Company.]

or negligence in not having effectually made it before. We think that these things do not appear by the petition and showing in this cause. By them it is shown, that petitioner himself is the only person on whom he can rely as a witness; and it is equally apparent, without looking into the affidavits of third persons, filed on behalf of plaintiff, Henry, that the latter would, on oath, contradict the petitioner. Moreover, it is not shown that defendant Wallace did not know of the sickness of Robinson, his original attorney, or that he did not have an opportunity to move in the Circuit Court, after the judgment was rendered, for a new trial. In a cause pending as long as this had been, about six years, parties must be held to the highest degree of diligence to be prepared for trial. Without considering any other question that might be raised, we are of opinion that petitioner is not entitled to the extraordinary remedy by writ of *mandamus*.

The motion must be denied, at the costs of the petitioner.

## Moore & McGee v. Burns & Company.

*Action on Promissory Note, by Payees against Makers.*

1. *Action by partnership; statement of partners' names.*—In an action by a partnership, the record must show the individual names of the several partners; although the statute (Code of 1876, § 3038) dispenses with the necessity of proving them, unless denied by plea verified by affidavit, and also (§ 2904) authorizes a suit against a partnership by its firm name.

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APPEAL from the Circuit Court of Madison.  
Tried before the Hon. LOUIS WYETH.

L. B. COOPER, for appellants, cited 1 Chitty's Pleadings, 256; *Reid & Co. v. McLeod*, 20 Ala. 576; *Lanford v. Patton*, *Donegan & Co.*, 44 Ala. 584; *Rhea v. Rawlings*, 3 Cr. C. C. 256; 1 Penn. 75, 137; 5 Halst. 295; *Bartlett v. Crozier*, 17 Johns. 439; 8 Ind. 451; 2 Stew. 506; 9 Pick. 546.

BRANDON & JONES, *contra*.—The statute dispenses with proof of the names of persons composing the partnership which is plaintiff, unless they are denied by plea verified by affidavit.—Code of 1876, § 3038. In pleading, it is a general rule, that it is not necessary to allege what it is not necessary to prove.

[Moore & McGee v. Burns & Company.]

MANNING, J.—The suit in this cause was brought in the name of "Burns & Company," who in the complaint are called the plaintiffs; and there was a judgment by default. There is nothing in the record indicating that this is the name of a corporation. Evidently, it is the style under which certain persons are or were associated together, probably as partners in business. But it is not anywhere shown who are the individuals that are or were associated together under that name. They did not bring this suit and make themselves, as parties thereto, amenable to the jurisdiction and orders of the court.

Only a person, natural or artificial, an individual or a corporation, can bring a suit in a judicial tribunal. It is for the trial and decision of causes for or between such persons only, that the tribunal is constituted; and as they become subject to its jurisdiction in such suits, the court must be informed who they are, upon or against whom its judgments and orders are to operate or be enforced.—1 Chitty's Pl. 256; *Reid & Co. v. McLeod*, 20 Ala. 577; *Opelika v. Daniel*, at this term.

By section 2904 (2538) of the Code of 1876, two or more persons, associated together as partners, may be sued as defendants by their firm name; and if process be served on one or more of such persons, a judgment may be rendered against the partnership, and satisfaction thereof be enforced out of the joint property. Perhaps, the difficulty, sometimes, of a plaintiff's finding out who all the persons are that compose such an association, caused this enactment. But it does not apply to plaintiffs so associated. They, of course, know, and can sue in their own names.

Section 3038 (2684), in the chapter "Of Evidence," does not change the law of pleading, or manner of bringing suits. It supposes that persons composing a firm or partnership have sued as such, setting forth their own names, and that of the firm; and as, presumably, these are correctly alleged, the statute will not allow a defendant to put them to the expense and delay,—which, if they live in a distant State, may be considerable,—of proving that allegation, unless its truth is denied under oath. This does not enable them to sue by their firm name alone.—*Lanford v. Patton, Donegan & Co.*, 44 Ala. 585.

There is no other error in the record. Let the judgment be reversed, and the cause remanded.



[Clarke v. Daviney &amp; Jack et al.]

## Clarke & Daviney v. Jack et al.

*Certiorari to Probate Judge, in matter of Contested Election.*

1. *Local legislation; constitutional provisions as to.*—An act to authorize the people of a particular county to vote on the question of removing the county-site, and to permanently locate the same according to their vote, is not a "special or local law for the benefit of individuals or a corporation," as those terms are used in the 23d section of the 4th article of the constitution; and whether the object of such a law can or can' not be provided for by a general statute, within that provision of the constitution, is a question of legislative discretion, and not of judicial determination.

2. *Same.*—As to notice of the intention to apply for the passage of a local law, required by the 24th section of the 4th article of the constitution, it is not necessary for the legislative journals to show that it was given: the courts will presume that it was given, unless the journals affirmatively show the contrary.

3. *Law submitting change of county-site to vote of people.*—A special statute, authorizing the people of a particular county to vote on the question of removing the county-site, and providing that the same shall be permanently located according to their vote, is not an improper delegation of legislative powers to the people, nor violative of any constitutional provision.

4. *Contest of election.*—The act approved January 24, 1877, entitled "An act to authorize the people of Franklin county to vote on the question of removing the county-seat of said county, and to permanently locate the same" (Sess. Acts, 1876-7, pp. 185-9), makes no provision for a contest of the election to be held under it; and the provisions of the general election law, regulating contested elections (Code of 1876, §§ 302-41), being confined to the election of persons to office, are not applicable to said election; consequently, there is no statutory provision for a contest of such election.

5. *Certiorari; when writ lies to probate judge, and in whose favor.*—When an election is contested, without authority of law, before a probate judge, and is by him held void, a *certiorari* lies from the Circuit Court to remove and vacate the proceedings; and the writ may be sued out by persons who were made defendants to the proceeding before the probate judge.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. W. B. WOOD.

On the 24th January, 1877, an act of the legislature was approved by the governor, entitled "An act to authorize the people of Franklin county to vote on the question of removing the county-seat of said county, and to permanently locate the same," which contained eight sections, as follows:

"SECTION 1. *Be it enacted,*" etc., "That it shall be the duty of the sheriff of Franklin county to open and hold an election in the several election precincts of said county on the first Saturday in March, 1877, for the purpose of deciding whether the seat of justice in said county shall be removed from Russellville, its present location. The inspectors, and other officers holding and returning said election, shall be appointed

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in the same manner, and by the same parties, as in the case of general elections.

"SEC. 2. *Be it further enacted*, That said sheriff shall give at least thirty days notice of said election, by posting up two or more written notices in some public place in each election precinct in said county. The polls at said election shall be opened by the hour of 9 A. M. at the several precincts in said county, and shall remain open till the hour of 5 o'clock P. M. All persons entitled to vote for representatives in the general assembly of Alabama shall be entitled to vote at said election. Each voter shall write on his ticket the words 'Removal' or 'No removal.' The said election shall be conducted under the same laws, and be governed by the same rules, except as herein directed, which govern general elections in this State.

"SEC. 3. *Be it further enacted*, That the returning officers and inspectors of said election at the several precincts shall hold, make returns, and do all things required by the general election laws of this State; and the supervisors of the said county shall proceed, as in case of a general election, to carefully count and compare the votes as returned from the several election precincts, and, when the votes are counted and compared, the sheriff shall make publication of the vote thus ascertained; and if it shall so happen that a majority of those voting at said election shall have voted for no removal, then, in that event, the seat of justice shall be and remain permanently located at Russellville; but, if a majority of all those voting at said election shall have voted for removal, then it shall be the duty of the sheriff to hold another election, as provided for in the next section of this act.

"SEC. 4. *Be it further enacted*, That if a majority of all those voting at the election provided for in the preceding sections of this act, shall have voted for removal, then the sheriff of said county shall open and hold another election on the second Saturday in May, 1877, for the purpose of enabling the people of said county to determine at what place they will locate the seat of justice of said county; which election shall be advertised as provided for in the preceding sections of this act, and conducted in all respects as therein directed and provided for in the first election. And the sheriff shall specify in his advertisements what places are in nomination, which shall be: first, the centre of the county, or within three miles thereof; second, the town of Frankfort; third, the town of Russellville. At said election, the voters in favor of locating the seat of justice at the centre of the county, or within three miles thereof, shall write on their tickets the word 'Centre'; those in favor of Frankfort shall write on their tickets the word 'Frankfort,' and those in



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favor of Russellville shall write on their tickets the word 'Russellville'; and the managers of the several precincts shall send up a correct and certified statement of the votes cast at said election, together with a list of voters voting at said election, as provided for in the first election; and the board of supervisors of said county shall, in like manner, count out and compare the votes sent up from the several precincts; and the sheriff shall, in like manner, make publication of the result of said election. If either of said places receive a majority of all the votes cast, such place shall be and remain the permanent location of the seat of justice of said county; and, in the event that neither place shall have received the majority of all the votes cast at said election, the place receiving the lowest vote shall be dropped, and the sheriff of said county shall proceed to hold another election; at which election, the two places having received the highest number of votes at the preceding election shall be voted for as the seat of justice. Said election shall be held on the first Saturday in July, 1877, and shall be held and conducted in the same manner as the preceding elections, and be governed by the same laws and regulations, so far as the same are applicable; and the place receiving the largest number of votes shall be the permanent seat of justice for said county; *Provided, however,* That the seat of justice shall be and remain at the town of Russellville, until suitable public buildings shall be prepared at the place to which said county-seat may be removed; *Provided, further,* That if the town of Frankfort shall be chosen as the seat of justice of said county, then the Commissioners' Court of said county shall, at their first meeting thereafter, appoint three commissioners to inspect the court-house, jail, and other public buildings now located at said town of Frankfort, who shall report to the next term of the Commissioners' Court; and if said commissioners report said buildings in a condition to be safely used for the purposes for which they were erected, then the records, etc., of the county shall be immediately removed from Russellville to said town of Frankfort; but, if said commissioners report that said public buildings are not in a condition to be used for the public purposes of the county, then the Commissioners' Court, at the first meeting thereafter, shall make all orders, and take all steps necessary for repairing said buildings, which must be done as speedily as possible, and which must be paid for out of any funds in county treasury which may have been or may hereafter be levied and collected for the purpose of erecting the court-house, jail, and other necessary public buildings of said county of Franklin; and as soon as the same are properly



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repaired, the records, etc., of said county shall be removed thereto as hereinbefore provided."

The 5th section provided that, in the event the county-site should be removed to the centre, or within three miles thereof, William P. Jack and six other persons, whose names were specified, should act as commissioners to select the particular site for the erection of the court-house and jail, and make report of their action to the Commissioners' Court of the county. The 6th section provided that, in the event the county-site should be removed from Russellville, the Commissioners' Court should sell the county property there situated, and purchase the necessary land for the erection of the new buildings; and authorized them to levy a special tax for the purpose of raising the necessary funds. The 7th section imposed a penalty on any officer who might fail to perform any duties imposed on him by the act; and the 8th repealed all inconsistent laws.—Session Acts 1876-7, pp. 185-9.

An election was held under this act, on the 12th May, 1877, the result of which, as determined from the returns by the board of supervisors, on the 19th May, was as follows: "Franklin 9, votes; Russellville, 652 votes; Center, 673 votes;" and proclamation of this result was accordingly made by the sheriff. Thereupon, on the 1st June, 1877, John K. Clarke and A. W. Daviney, citizens of said county, residing in Russellville precinct, presented their petition to the probate judge of said county, seeking to contest the said election. The petition was under oath, and specified several distinct grounds of contest. It alleged that the election was void, because the provisions of the law under which it was held were not complied with, and because said law was unconstitutional and void; and also specified various irregularities in the conduct of the election, which it is not necessary to notice. The grounds on which the constitutionality of the law was attacked, as stated in the petition, were—1st, that it was a local or special law, and was therefore within the prohibition of the 23d section of the 4th article of the constitution; and, 2d, that no notice was given of the intention to apply for the passage of such a law, as required by the 24th section of said article. The petition prayed, that a day might be set for the hearing; "that proper and legal notice of this contest be given to such officers or parties as may be entitled thereto, for the time required by law, to appear and answer the same; and that all other and further proceedings be had, and orders made, as may be needful and proper in the premises."

On the filing of this petition, the probate judge appointed the 21st June, 1877, for the hearing, and ordered notice to be

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given to W. P. Jack and the other commissioners named in the law; and also to the county commissioners, the sheriff, the inspectors, returning officers of the election, etc. The said W. P. Jack and others, locating commissioners under the act, appeared on the appointed day, and moved to dismiss the proceeding for want of jurisdiction; and also filed a demurrer to the petition, and a plea to the jurisdiction. Thereupon, as the judgment-entry recites, "the parties appeared by their attorneys, and, by agreement, submitted for determination by the court—1st, the constitutionality of the said act, on the grounds specified by said contestants; 2d, the defendants' motion and plea to the jurisdiction; 3d, the defendants' demurrer to the legal sufficiency of the grounds of contest specified by the contestants." The probate judge held that he had jurisdiction of the proceeding, and that the petition was sufficient; and he therefore overruled the demurrer to the petition, refused the motion to dismiss, and sustained a demurrer to the plea to the jurisdiction; and also rendered judgment declaring the law unconstitutional, and the election under it null and void.

On the 3d September, 1877, Jack and the other locating commissioners presented their petition, under oath, to the Hon. W. B. Wood, the judge of the fourth judicial circuit, exhibiting a copy of these proceedings, alleging that they were void for want of jurisdiction, and praying that they might be removed by *certiorari* into the Circuit Court. The *certiorari* having been granted, returnable into the Circuit Court, and the return there duly filed, Clarke and Daviney there appeared by attorney, and moved to dismiss the *certiorari*—1st, "because neither of said petitioners, so far as the record shows, or their petition avers, has any individual right or interest, pecuniary or otherwise, that has been impaired or affected by said decision of said probate judge, which they now seek to have revised and annulled;" 2d, "that said petitioners have no right or interest involved in said proceeding, that is not of a public character, held by them in common with all the electors and people of said county, and are therefore precluded by law from prosecuting this proceeding in their individual names." The Circuit Court overruled the motion to dismiss, and rendered judgment quashing the proceedings had before the probate judge. In support of this judgment, the circuit judge delivered an elaborate opinion in writing, discussing every question presented by the record; holding that the probate judge had no jurisdiction of the matter of contest, and overruling all the objections urged against the constitutionality of the law.



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The judgment and rulings of the Circuit Court are now assigned as error.

J. B. MOORE, with whom was W. COOPER, for appellants.—1. The *certiorari* ought to have been dismissed, for several distinct reasons. In the first place, it was sued out by volunteers, whose private rights were in no wise invaded or affected.—*Jones v. Black*, 48 Ala. 540; *Ex parte Strobach*, 49 Ala. 443; 34 Ala. 283; 46 Ala. 389; 20 Texas, 16. In the next place, a *certiorari* should never be awarded, when the right of appeal exists.—*Wright v. Gray*, 20 Ala. 363; 46 Ala. 389; 8 Ala. 552. Again, the decision of the probate judge was rendered by consent and agreement; is it revisable?—20 Ala. 128; 5 Ala. 770; 32 Ala. 13; 50 Ala. 561. The proceedings are not final, and therefore are not revisable.—*Walters v. Coker*, 39 Ala. 730; 16 Ala. 828; 9 Porter, 274; 19 Ala. 198; 3 Ala. 323; 1 Root, Conn. 201; 4 Porter, 83; 1 Stewart, 183; 40 Cal. 479; 38 N. J. Law, 377; 43 Barbour, 232.

2. The act under which the election was held is violative of several constitutional provisions, especially the 23d and 24th sections of the 4th article. The former section declares, "No special or local law shall be enacted, for the benefit of individuals or corporations, in cases which are or can be provided for by a general law;" and the 25th section, in connection with this prohibition, enjoins on the legislature the duty to pass "general laws under which local and private interests shall be provided for and protected." That this section is mandatory and imperative, see Cooley's Const. Lim. 79. This law is a local law; it is for the benefit of a corporation; and its object might have been attained by the passage of a general law. That a county is a corporation, see Code of 1876, § 815; *Lowndes County v. Hunter*, 49 Ala. 507; 48 Ala. 449; 45 Ala. 176; 41 Ala. 114. That a general law can be enacted, on the subject of removing and locating county-sites, is shown by the fact that such a general law does exist in Nevada, Indiana, California, and Texas.—6 Nevada, 104; 6 U. S. Digest, N. S., 195, §§ 1-3; 14 *Ib.* 141, §§ 7-8. Such a law was held unconstitutional in Indiana, under a state of facts almost identical with this case.—*Thomas v. Commissioners*, 5 Indiana, 4. Again, the probate judge found, as a fact, that no notice was given of the intention to apply for the passage of this law; and this failure renders the election null and void.—*People v. Hamilton County*, 3 Nebraska, 244.

WALKER & SHELBY, *contra*.—1. The proceedings before the probate judge were void for want of jurisdiction. The law



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under which the election was held makes no provision for a contest, and the general law regulating contested elections does not apply to such an election, being confined by its terms to the election of persons to office.—*Sullivan v. Robinson*, 39 Ala. 614; *Logwood v. Bank*, Minor, 23; 18 Geo. 340; 1 Blatchf. 556. The decree is void, also, because it declares a statute unconstitutional at the suit of mere volunteers, who do not show any invasion of their rights.—*Jones v. Black*, 48 Ala. 542; *Cooley's Const. Lim.* 163-4, and cases there cited.

2. The proceedings being void, *certiorari* was the proper remedy to remove them to the Circuit Court, a court of general jurisdiction; and being certified to that court, they might be quashed on motion, or declared null and void on assignment of errors.—*Sullivan v. Robinson*, 39 Ala. 615; *Thomas v. Adams*, 2 Porter, 188; *Fitch v. Conner*, 22 Wendell, 132. That the decree is void, is not a sufficient reason for refusing to quash it: it is a decree to which the petitioners were made defendants, and they have a right to have it vacated.—3 U. S. Digest, 1st series, 248, and fifteen cases there cited. The petitioners were made defendants to the contest, and it can not now be urged that they were not parties, or were improperly made parties.—Herman on Estoppel, 336, § 322; 8 Abbott's N. Y. Digest, 255; 30 N. Y. 226; *Brown v. Chappell*, 12 Wallace, 681; 2 John. Ch. 242; 5 John. Ch. 191; *Taylor v. Longworth*, 14 Peters, 174. As to the finality of the decree, see Freeman on Judgment, § 16; *Belt v. Davis*, 1 Cal. 138; 2 Peters, 449; 7 Bush, Ky. 623; *Elliott v. Mayfield*, 3 Ala. 226.

3. These principles are decisive of the case, without passing on the constitutionality of the law under which the controversy arose; and this being so, the court will not decide that question.—*Cooley's Const. Lim.* 163, and cases there cited. But the validity of the law can not be successfully controverted. It is not a special law "for the benefit of individuals or corporations," as those words are used in the 23d section of the 4th article of the constitution; which apply only to private corporations, and are intended to prohibit the passage of any law granting to such corporations, or to individuals, any peculiar, exclusive privileges or immunities. A county is a public corporation, to which is intrusted a part of the governmental power, and of which the courts take judicial notice. Whether the object of the law, if it should be held to fall within the prohibited class, could be as effectually secured by a general law, is not a question for judicial decision, but was addressed to the legislative discretion and determination. The case of *Thomas v. Commissioners*, 5 Indiana, cited to this point by appellants, has been overruled,

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in effect, by a subsequent decision of the same court, and has been expressly repudiated in Missouri.—*State v. County Court of Boone*, 50 Mo. 317, or 11 Amer. Rep. 415; 7 Indiana, 328. If this position be correct, no preliminary notice of the intended law was required; and if such notice was necessary, the court will presume that it was given, rather than presume that the legislature failed to perform its duty.

STONE, J.—We are asked to pronounce unconstitutional the act “To authorize the people of Franklin county to vote on the question of removing the county-seat of said county, and to permanently locate the same,” approved January 24, 1877.—Pamph. Acts, 185. The particular grounds urged in favor of such ruling are—first, that the statute violates section 23 of article IV of the constitution, which ordains, “No special or local law shall be enacted, for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this State.”

We do not consider this a *special* or *local* law, for the benefit of an *individual* or *corporation*, in the sense in which the latter term is employed in the constitution. It affects the whole county, and relates to its political organization.—*Eitel v. State*, 33 Ind. 201; *Askew v. Hale County*, December term, 1875; *Chambers v. Lee County*, December term, 1876. But we think this question is necessarily one of legislative discretion, and, on questions such as this, not one of judicial determination. Many facts and considerations may enter into the inquiry whether the particular want or object “can be provided for by a general law.” A strong local want or desire may exist, clamoring for an enactment, which the legislature could make general, but which the general public, not only do not desire to have operative upon them, but would stoutly resist, if proposed. To hold that the question whether the object of a proposed local or special statute can be provided for by a general law, is, at all times, one of judicial inquiry, would lead to most deplorable doubt and uncertainty, alike in the enactment and administration of the law. There is scarcely a conceivable subject of local or special grievance, for the redress of which an ingenious advocate or disputant could not find or frame a general enactment.

2. In the second place, it is urged against the constitutionality of this enactment, that notice of the intention to apply therefor was not published in the locality where the matter or things to be affected were situated, for twenty days prior to the introduction of the bill in the general assembly. As we understand this objection, it is not founded



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on any allegation that the journal shows affirmatively such notice was not given. It rests on its failure to affirm that the notice was given. In *Harrison v. Gordy*, at the last term, we decided this identical question, adversely to the argument here made. We then said, "We think it is our duty to indulge the intendment, that the legislature conformed to every constitutional requirement, which the journal of its proceedings does not affirmatively show was disregarded." See *Cooley's Const. Lim.* 139. This would be decisive of the question we are considering, even if it were presented in the present cause. But, under the rule declared above, this is not a local or special law which requires publication to justify its enactment.—See, also, *Cooley's Const. Lim.* 128; *Marks v. Trustees*, 37 Ind. 163; *State v. County of Boone*, 50 Mo. 317; *State v. McCann*, 21 Ohio St. 211.

3. A third objection to the enactment is, that the legislature did not finish its work, but referred certain questions to a vote of the people. Nothing which pertained to the enactment of the law was referred to the people of the county. The law was complete in all its parts, before any vote was taken. There was no election ordered, or held, to determine whether the action of the legislature should become a law. The question was, whether the legal voters of Franklin county elected to have a change of the site of their courthouse. There is nothing in this objection.—*Cooley's Const. Lim.* 119, note 4, and numerous authorities.

4. Clark and Daviney, appellants, filed their petition to the probate judge of Franklin county, seeking to contest the election, on several grounds therein set forth. Had the probate judge authority and jurisdiction to hear and determine the questions raised by the petition? In *Echols v. State, ex rel.*, at December term, 1876, we, on satisfactory reasoning and authorities, determined that the right to contest an election is purely statutory; and that when the statute does not confer the right, it does not exist. We declared, however, that there were common-law modes of determining contested elections; and when the statutes did not inhibit a resort to such common-law modes, they might be appealed to, in cases for which no statutory contest was provided. Is there any statute which authorizes the present contest? There is nothing in the act of January 24, 1877, under which this election was held, which makes express provision for such a contest.

It is contended, however, that certain clauses of this statute bring this election within the influence of the general election law; and inasmuch as the general election law provides a mode of contesting elections held under it, this elec-



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tion may be contested under those provisions. The clauses relied on are as follows: "All persons entitled to vote for representatives in the general assembly of Alabama, shall be entitled to vote at said election." "The said election shall be conducted under the same laws, and be governed by the same rules, except as herein directed, which govern general elections in this State." "That the returning officers, and inspectors of said election at the several precincts, shall hold, make returns, and do all things required by the general election laws of this State; and the supervisors of the said county shall proceed, as in case of a general election, to carefully count and compare the votes as returned from the several election precincts; and, when the votes are counted and compared, the sheriff shall make publication of the vote thus ascertained."

The provisions of the general election law which relate to contested elections, are embraced in the six articles of chapter 4, title 6, part 1, from section 302 to section 341, Code of 1876. It will be seen that they relate only to "the election of persons declared elected to any office," &c. Section 325 directs, that "a copy of such statement, with the day of trial indorsed thereon, must be served on the person whose election is contested, or left at his usual place of residence," &c. Not one word in the whole chapter which relates to any elections, save those of persons to office. We hold, that there is no law providing for a contest of an election such as this, and the probate judge of Franklin county had no jurisdiction whatever of the cause.

5. A contest of an election is, in its nature, judicial. When an inferior court or tribunal assumes jurisdiction of a subject-matter, and pronounces judgment, in a matter over which it has no jurisdiction, and the law provides no appeal from such judgment, the common-law writ of *certiorari* is the appropriate remedy, to correct his errors, and vacate and quash the proceedings. The statute provides no appeal from a judgment, such as the judge of probate rendered in this cause, and *certiorari* was the proper remedy.—1 Brick. Dig. 333, §§ 2, 4, 5. The proceedings in the Probate Court were prosecuted, on a notice to, and defense by the persons who sued out the *certiorari* in this cause; they were commissioners and officers charged with important duties in reference to the new county-site, should one be elected; and we hold that appellants can not be heard to controvert their right to sue out *certiorari* from the Circuit Court. To hold otherwise, would be to declare that, although a serious judicial error was committed by the judge of probate, yet no one

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has such special interest in the subject-matter, as that he can move to have the error corrected.

We have been much aided by the able argument and opinion of the circuit judge in this cause, and, on all the questions considered by us, we have adopted his conclusions.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

## Bizzell v. Nix.

*Bill in Equity to enforce Vendor's Lien for Purchase-Money of Land.*

1. *Vendor's lien ; how affected by statute of limitations.*—A vendor's equitable lien for the unpaid purchase-money of land is not lost or destroyed, because the statute of limitations has barred an action at law on the notes for the purchase-money ; and this principle applies where he has conveyed the land by absolute deed, taking no mortgage or other security, as well as where he has retained the title, and executed only a bond for title. (MANNING, J., *dissenting*).

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| 60 | 281 |
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| 88 | 521 |

APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 31st January, 1876, by John Nix, against William G. Bizzell, and sought to enforce a vendor's lien for the unpaid purchase-money of land. The land was sold and conveyed by the complainant, on the 15th March, 1859, to William H. Bizzell, who was the father of said William G., the defendant in this suit. A small part of the purchase-money was paid in cash, and the purchaser gave his two promissory notes for the residue, payable on 1st January, 1860, and 1861, respectively ; on which notes several partial payments were made, as shown by credits indorsed on them. The purchaser was put in possession of the lands under the contract, and continued in possession until his death, which occurred in February, 1874, leaving said William G. Bizzell his only child and heir-at-law. The defendant answered the bill, and, with other matters which require no notice, pleaded the statute of limitations of six years in bar of the relief sought. The chancellor held that, "where the interests of third persons do not interfere, the vendor's lien is not barred by the statute of limitations of six years ;" and he therefore rendered a decree for the com-

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plainant, and ordered a sale of the lands as prayed. The chancellor's decree is now assigned as error.

SNEDECOR, COCKRELL & HEAD, for appellant, cited *Halfman v. Ellison*, 51 Ala. 543-48; Perry on Trusts, 211, § 234, and cases there cited; Thomas on Mortgages, 27-8; 1 Lead. Cas. in Eq. 276; 7 Yerger, 9.

THOS. W. COLEMAN, and E. MORGAN, *contra*, cited *Driver v. Hudspeth*, 16 Ala. 348; *Relfe v. Relfe*, 34 Ala. 500; *Mahone v. Haddock*, 44 Ala. 90; *Thompson v. Cooper*, at the last term.

BRICKELL, C. J.—The authorities which, doubtless, induced the decree of the chancellor, and which are now relied on to support it, are *Driver v. Hudspeth*, 16 Ala. 348, and *Relfe v. Relfe*, 34 Ala. 500. The first was a proceeding under the statute then in force (Clay's Dig. 157, § 38), in the Orphans' Court, at the instance of a vendee holding a bond for title, to compel the personal representatives of the vendor, who had died, to make him title. The purchase-money had not been paid, but an action at law on the notes given for it was barred by the statute of limitations. It was held, that a vendor retaining the legal titles, and entering into bond for its conveyance only on payment of the purchase-money, had a lien in the nature of a mortgage; that this lien the court would not divest, until the purchase-money was paid; and that it was not impaired, because an action at law for the recovery of the purchase-money was barred by the statute of limitations. The court say: "The fact that the notes were barred by the statute of limitations does not destroy the lien, which is regarded in the nature of a mortgage. If the vendor, whose notes are barred, or his heirs after his death, should bring ejectment to recover the land, and thus drive the purchaser into a court of equity to enjoin the action, it is clear to my mind that the court of chancery would not interfere, until he had paid up the purchase-money, the remedy to recover which at law had been barred by the statute of limitations. The court of equity would not decree a specific performance, in favor of one who withholds the compensation he stipulated to pay, upon the ground that the legal remedy to recover it is barred. The vendor is not bound to sue upon his note, but may rest upon the security furnished by his lien."

The contract of sale, in *Relfe v. Relfe*, was by parol, and, so far as is shown by the report of the case, the vendor had not conveyed. It was held, that the lien for the payment of the purchase-money was not lost, or destroyed, because the statute of limitations had operated a bar for its recovery in



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an action at law. It was further held, that the lien could not be regarded as a stale demand, within less than twenty years after the sale. It is said by the court: "The principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance, as for example a mortgage, nor to those secured by a sealed instrument, nor even to those provided by an express contract." Again, "The principle is, the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law; and there is no inconsistency in the prosecution of another remedy, after the action at law is barred." The court was referred to the New York and Mississippi decisions, to which the appellant now refers, and declined to follow them, saying, "These decisions are not correct expositions of the law."

We are not inclined to depart from these decisions. The present case is different in its facts, and the rights of the parties are materially different; but the difference does not render inapplicable the principle which underlies and forms the reason of these decisions. In the present case, the vendor parted with the legal estate, and, taking no independent security for the purchase-money, has simply the lien which a court of equity, on its own principles, raises and enforces for his security. It is not matter of contract—it does not arise from the presumed intention of the parties, though its existence or waiver may often depend on such intention. It is subordinate to other equities acquired by strangers in ignorance of its existence, and it is moulded and fashioned by the court as the facts of the particular case may require. With the lien of a vendor retaining the legal estate as a security for the purchase-money, it has no other common element, than that it is a security for a debt—passing by an unqualified assignment of the debt, and capable of enforcement by a decree of a court of equity. It has not the qualities of a mortgage, which is a conveyance of the legal estate, conferring a right of entry at law, and to which the lien of a vendor retaining the legal estate is analogous.—*Bankhead v. Owens*, at present term.

The general principle, that when the security for a debt is a lien on property, personal or real, the lien is not impaired, because the remedy at law for the recovery of the debt is barred, is not, as is very emphatically and clearly stated in *Relfe v. Relfe*, confined to liens created by contract, or by instruments under seal, or by mortgages, which convey a legal estate, and confer a right of entry. The debt is not extinguished, though the statute of limitations may have barred legal remedies for its recovery. The bar of the stat-

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ute may be removed by a subsequent promise or acknowledgment, which is supported by the debt as a consideration; and the consideration rests on the moral obligation to pay, which statutes can not obscure or impair. The debt not being extinguished, the lien for its security remains; and though legal remedies are barred, the equitable remedy to enforce the security is unaffected. It is not necessary further to pursue a discussion of the question. We can not regard it as *res integra*. The discussion was exhausted, and is foreclosed by the decisions to which we have referred; and on their authority we are content to rest.

The decree of the chancellor is affirmed.

MANNING, J. (*dissenting*).—The passage quoted from the case of *Relfe v. Relfe*, containing views no where else asserted in any decision of this court, ought not, it seems to me, to be regarded as authoritatively determining the question here presented. Both that, and *Driver v. Hudspeth*, differ very materially from the present case, in this: the creditors in those cases had estates in the lands for which the debts were contracted; titles were reserved to, or remained in them, for their security, upon which they could, respectively, maintain suits for the lands themselves, or for a sale of them to pay the debt, after actions at law for the debts were barred. This is the doctrine that was distinctly settled in *Doe, ex dem. Duval's Heirs v. McLosky* (1 Ala. 710), and has been ever since recognized as clear and familiar law; and it alone, without anything more, plainly justifies the decisions in the cases first above cited; and that of *Driver v. Hudspeth* is expressly founded upon it.

In the present case, the land was conveyed by the vendor, without reserving or contracting for any lien upon it for the purchase-money. The object of the bill is to have established what is called the equitable lien of a vendor; a lien which is the "mere creature of a court of equity; . . . a right which has no existence, until it is established by the decree of a court in a particular case, and is then made subservient to all other equities between the parties."—*Gilman v. Brown*, 1 Mason, 191; *Houston v. Stanton*, 11 Ala. 422-3; *Halfman v. Ellison*, 51 Ala. 551; *Bankhead v. Owens*, at the present term. "It is neither a *jus in re*, nor a *jus ad rem*. . . . It is not a direct trust in the land itself, but a collateral trust for the security of the debt. It is in fact a *remedy* for the debt, and not a right of property. It follows, that the remedy can be enforced only so long as the debt can be enforced. . . . If the action is barred by the statute of limitations, the remedy to enforce the lien is gone also."

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1 Perry on Trusts, § 234, and cases there referred to; 1 Lead. Cas. in Eq., Wh. & Tu. Notes, 4th Amer. Ed. 481, 496; 1 Jones on Mort. § 218.

This conclusion appears to me, logically, inevitable, as as well as in direct accord with several decisions of this court: *Halfman v. Ellison*, *supra*, *Bankhead v. Owens*, at the present term, and others. Upon what principle, can a chancellor interfere, and establish a lien, when the parties have not contracted for any, and thereby coerce payment of a debt which is barred by a legislative enactment, declarative of the policy of the State in favor of repose against delayed litigation? Such authority in a court of chancery is not consistent with merely judicial functions. And since the express extension of the statute of limitations to suits in chancery (Code of 1876, § 3758), the courts appear to me prohibited by positive law from creating such a lien, while the bar of the statute exists. This extension of the statute was not referred to at all in *Relfe v. Relfe*, probably because the case arose too soon after the adoption of the Code of 1853, by which the statute was extended to courts of equity, to be affected thereby.

With great respect for the opinions of my brothers, I feel obliged to dissent from the conclusion they have reached.

## Dillard and Wife v. Winn.

### *Statutory Action in nature of Ejectment.*

1. *Resignation of trustee; withdrawal of, and subsequent sale.*—A trustee with power of sale, appointed by a deed given to secure the payment of a debt, having tendered his resignation to the register in chancery, as provided by law (Code of 1876, § 3727), may nevertheless withdraw it, at any time before final action has been taken on it by the register, and execute the power of sale conferred by the deed.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. JOHN HENDERSON.

This action was brought by Mrs. Willie G. Winn, against A. W. Dillard and M. C. Dillard, his wife, to recover the possession of a tract of land; and was commenced on the 10th April, 1876. The land had been sold and conveyed by the plaintiff, on the 2d October, 1872, to Mrs. M. C. Dillard, who, with her said husband, gave their several promissory notes for the purchase-money, the last maturing on the 1st January, 1876; and said Dillard and wife at the same time con-



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veyed the land by deed to George G. Lyon, as trustee, to secure the payment of the said notes, and authorized him to sell if default should be made in their payment. The trustee indorsed on the deed his acceptance of the trust; and on the 8th April, 1876, default having been made in the payment of the notes, and due notice of the sale having been given, he sold the land under the power contained in the deed, the plaintiff becoming the purchaser at the sale, and receiving the trustee's deed. On the trial, as the bill of exceptions states, the plaintiff offered these three deeds in evidence, the proper execution of which was admitted; "and it was admitted, also, that if said Geo. G. Lyon had authority to sell, the sale by him was fairly made, and in full compliance with the requirements of the deed to him as trustee." The defendant offered in evidence a certified transcript from the records of the Chancery Court of Marengo, showing the proceedings therein had on the petition of said Lyon, tendering his resignation as trustee under the deed, and asking that a "day be appointed, and proceedings be had as by law directed in such cases." This petition was filed, as the transcript showed, on the 10th January, 1876; and the register thereupon appointed the 24th January, for the hearing of the petition, and ordered notice to be given to Mrs. Winn, and to Dillard and wife. Notice was given to all the parties, as required by the register's order; but the transcript does not show that anything was done in the matter on the day appointed. On the 6th March, 1876, Lyon wrote to the register, withdrawing his resignation; and the register seems to have allowed the withdrawal. On the 5th April, Dillard moved before the register to vacate the order allowing Lyon to withdraw his resignation, because it was made without notice, or to amend that order, *nunc pro tunc*, so as to require notice to be given; and the register made an order, on the same day, granting an amendment of the former order, and requiring notice to be given of "the said application to withdraw said resignation." These are all the facts shown by the transcript; and the above being all the evidence in the case, "the court charged the jury, in substance, that under the evidence the plaintiff was entitled to recover the possession of the premises sued for." The defendants excepted to this charge, and they here assign it as error.

SNEDECOR & COCKRELL, with whom were RICE, JONES & WILEY, cited *Shepherd v. McEvers*, 4 Johns. Ch. 136; *In re Van Schoonhaven*, 5 Paige, 559; *Wilson v. Troup*, 2 Cowen, 195; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Hunt v. Acre*, 28 Ala. 598.

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WATTS & SONS, with W. E. & R. H. CLARKE, *contra*.

MANNING, J.—The determination of this cause turns upon the question, whether the trustee, George G. Lyon, had, before he sold the land in controversy to appellee (plaintiff below), divested himself of the title and power of trustee. To this end, he had made application to the register in chancery, under the chapter beginning with section 3727 (3447) of the Code of 1876, tendered his resignation, and asked that a day be set for the determination of the matter, and his discharge from responsibility. But, before final action thereupon, or any decision or ruling made upon his application, he withdrew the tender of his resignation, and continued to act as trustee, and sold the land. It was agreed on both sides, that, if he had the power to sell, the sale was made in strict compliance with the provisions of the trust-deed to him; and all the evidence was agreed upon, or consisted of deeds, copies of proceedings before the register, and other writings.

The rule of law is, that one who has accepted the title to real property as trustee, and undertaken to perform the duties of that relation, can not divest himself of them at pleasure. In the absence of provisions to that effect in the deed or instrument creating the trust, or of a statute authorizing it, he can not resign his trusteeship, or be discharged thereof, except by the decree of equity; "and the reason is, that if the estate has once vested in the trustee, it can not be divested by a mere disclaimer, or renunciation; nor can he convey the estate, against the consent of the *cestuis que trust*, without committing a breach of trust."—1 Perry on Trusts, § 268. And this doctrine was held to be applicable to a trustee of personal property, in *Drane v. Gunter*, 19 Ala. 731.

The sections (3727 to 3731) under which the application was made by Lyon, and his resignation tendered, with a prayer "that a day be appointed, and proceedings be had as directed by law in such cases," provide for a settlement of the trusteeship, and a granting of the application for a discharge. Section 3731 enacts: "The register, on the granting of such application, may appoint a trustee," &c. In this case, there was no granting of the application, and no other trustee was appointed. The title remained in Lyon, and his sale conveyed it to appellee.

It is ingeniously attempted to be shown, by reference to some cases in New York, that the power to sell mortgaged property to pay the debt, may be conferred on the mortgagee, by an instrument separate from the mortgage;

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and thence to argue, that this power may be renounced, without interfering with the title to the property in the mortgagee, or the right to have it appropriated, through a court of equity, to the payment of the debt. Suppose the argument be sound, how does it touch this case? Lyon was not the creditor with a mortgage: he is a trustee, to whom the title to the property was conveyed, to enable him, as trustee, to sell it to pay a debt to the creditor. He did not propose to resign, if he could do so, the mere power to sell, but to divest himself of the title he had as trustee, as well as of the duties of that relation—of the whole, and not of a part; and this not being accomplished, his application was withdrawn, and all proceedings thereupon were discontinued, leaving in him the estate and powers which the trust-deed conveyed to and conferred upon him. There is nothing in the authorities referred to on behalf of appellant, to repel the plain conclusion that the trustee's authority to sell and convey were unimpaired, when the property was sold, and appellee became the purchaser.

Let the judgment of the Circuit Court be affirmed.

## Johnson v. Murphy, Agnew & Co.

### *Bill in Equity for Cancellation of Mortgage as Cloud on Title.*

1. *Homestead exemption; governed by what law.*—The right to claim a homestead exemption, as against a mortgage dated March 31, 1873, is to be determined by the constitution of 1868 alone.

2. *Cancellation of mortgage, on ground of fraud.*—If a creditor procures the execution by his debtor of a mortgage for past advances, by promising to make additional advances during the current year, the breach of this agreement on his part, although it might support an action at law, or a plea of set-off to the extent of the injury actually sustained, will not support a bill in equity for the cancellation of the mortgage on the ground of fraud.

3. *Misjoinder of complainants.*—When several persons unite as complainants in a bill in equity, all must be entitled to relief, or none can obtain it.

4. *Cloud on title; what conveyance is.*—As to a mortgage on lands, to which are signed the names of the four persons to whom they belonged as joint tenants, or tenants in common, and a certificate of acknowledgment in proper form is appended, while the names were in fact all signed by one of them only, without written authority from the others, the court is "not prepared to say it does not create such a cloud on the title as that equity would entertain a bill to remove it," at the suit of the proper parties; but the defense could also be made by them at law.

APPEAL from the Chancery Court of Choctaw.

Heard before the Hon. A. W. DILLARD.



[Johnson v. Murphy, Agnew & Co.]

The bill in this case was filed on the 20th December, 1873, by John M. Johnson and his three sisters, F. A. Johnson, A. H. Johnson, and E. P. Johnson, against the persons composing the firm of Murphy, Agnew & Co., commission-merchants in the city of Mobile; and sought to enjoin a sale of certain lands under a power contained in a mortgage, and to have the mortgage declared null and void, and cancelled under the decree of the court, as a cloud on the complainants' title to the lands. The mortgage, a copy of which was made an exhibit to the bill, and which was dated the 31st March, 1873, was in these words: "Know all men by these presents, that the note of even date with this *date*, to Murphy, Agnew Co., for the sum of \$902.25, and payable on the first day of December, A. D. 1873, was given for advances obtained by them from Murphy, Agnew & Co. *bona fide* for the purpose of making a crop, and that without such advances it would not be in our power to procure the necessary teams, provisions, labor, and farming utensils to make a crop; and we also hereby declare, that said advances, or the amount thereof, shall be a lien on our crop of corn and cotton grown on our plantation in Choctaw county, Alabama, this year, in accordance with the act of the legislature of Alabama approved January 15, 1866. In consideration of said advances, and further to secure the payment of the note above specified, according to the tenor and effect thereof, we do hereby also bargain, sell and convey to the said Murphy, Agnew & Co. the following personal property, to-wit: our entire crop of cotton and corn as aforesaid, and the following described real estate, to-wit: all of section thirty-two (32), township fifteen (15), range one (1) west; and if said note is not paid at maturity, the said Murphy, Agnew & Co. are hereby authorized to take the said personal property into their possession, and to sell the same at usual commissions of two and one-half per cent.; and the real estate to be sold, first giving at least thirty days' notice of the time and place of said sale, by posting notices at three public places in said county, and apply the proceeds of said sale to the payment of said note; upon the condition, nevertheless, that if said note is paid at maturity, this conveyance of said last-mentioned personal property is to be void and of no effect. In further consideration of the premises, we hereby promise and agree to ship our entire crop of cotton and [corn] raised this year, as above specified, to the said Murphy, Agnew & Co., cotton factors in Mobile, Alabama, to be sold by them at the usual commission of two and one-half per cent. Given under our hands," etc.

The names of all the complainants were signed to this

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mortgage, and their seals affixed ; and appended to it was the certificate of a justice of the peace, also dated the 31st March, 1873, that the grantors, personally known to him, appeared before him on that day, and acknowledged their execution of the deed. The bill alleged, that the names were in fact all signed by the said John M. Johnson, without any authority from his co-complainants, and that he alone acknowledged it before the justice of the peace ; that he was induced to execute the mortgage by the promise of George Agnew, a member of said firm, that said Murphy, Agnew & Co. would make further advances, and furnish sufficient supplies to enable him to cultivate a crop and carry on his farming operations during the year 1873 ; that this promise they failed to perform, and refused to make any advances whatever after the execution of the mortgage ; that the mortgage was thus fraudulently obtained, and was null and void in equity. The defendants answered the bill, and admitted that the names of all the grantors were signed to the mortgage by John M. Johnson ; but they alleged that said Johnson, at the time of its execution, represented that he had full authority to sign his sisters' names, and that he in fact was authorized by them to sign their names, and that they approved and ratified all that he had done, and never raised any objection to the validity of the mortgage until after the property was advertised for sale under it. They denied that they had promised to make any further advances, or that the mortgage was given in consideration of any such promise on their part ; and alleged that the note and mortgage were given for an existing and acknowledged indebtedness, and to procure an extension of the time of payment thereof. They filed a cross-bill, also, in which they alleged that, by mistake of the justice of the peace by whom it was written, the mortgage purported to be given for advances and supplies furnished under the statute, instead of an existing indebtedness simply ; and prayed that it might be corrected in this particular, and foreclosed under the decree of the court.

The justice of the peace by whom the mortgage was written, and whose deposition was taken by the complainants, testified as follows : " I drew it [the mortgage] myself. It was given upon the understanding that Murphy, Agnew & Co. would advance to Johnson that year. I don't know how the negotiations began. John M. Johnson and Agnew were present. The ladies were, I suppose, at home, some five miles. The conversation that took place was about this: Agnew and Johnson came to me, and wanted me to draw the mortgage, and stated that it was for advances for the



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year. I drew the mortgage, and included all the forties in it. I stated that we must have the ladies in my presence, or the signatures would be worthless. They agreed between themselves that, as Johnson had before then transacted all his sisters' business, they would risk his signing their names then; and Agnew and Johnson both said they were willing to risk it." Again: "Johnson would not give the mortgage for an extension, unless Agnew would advance to him: the advance was the consideration. I took the acknowledgment, upon the express understanding with Agnew that he would risk it, and stated that the signatures were [of] no account without they were present."

On final hearing, on pleadings and proof, the chancellor held—1st, that the alleged representations, or promises, as to future advances, if fully proved, constituted no ground for equitable relief against the mortgage; 2d, that John M. Johnson could not claim any homestead exemption in the mortgaged premises, because the bill contained neither allegations nor prayer for relief as to that matter; 3d, that the mortgage was absolutely void as to the other complainants, but was equally void at law and in equity; 4th, that no relief could be granted to any of the complainants, because John M. Johnson was entitled to none. He therefore dismissed the bill, and his decree is now assigned as error.

BRAGG & THORINGTON, and W. F. GLOVER, for appellant. Under the proof, there can be no doubt that John M. Johnson was induced to execute the mortgage by Agnew's promise to make additional advances, to enable him to make a crop during the year 1873; and there is no pretense that the advances were made. This promise, or representation, amounts to an engagement which a court of equity will compel a party to make good.—Kerr on Fraud and Mistake, 89. As to equitable relief against fraud, see *Kennedy v. Kennedy*, 2 Ala. 571; *Chambers v. Crook*, 42 Ala. 171; *Langdon v. Roane*, 6 Ala. 518; *Thompson v. Lee*, 31 Ala. 292; Story's Equity, §§ 186, 190-93. But, even if John M. Johnson was not entitled to any relief against the mortgage, the right of the other complainants is beyond dispute. As to them, though the mortgage is valid on its face, it is null and void; and they are entitled to have it cancelled, as a cloud on their title to the land.—*Daniel v. Stewart*, and *Lockett v. Hurt*, at the last term. The bill should not have been dismissed, without allowing them an opportunity to amend by striking out the name of John M. Johnson; or, at least, the dismissal should have been without prejudice.—*Knight v. Blanton*, 51 Ala. 333; *Reese v. Kirk*, 29 Ala. 410; *Michan v. Wyatt*, 21 Ala. 813;



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*Danforth v. Herbert*, 33 Ala. 497; *Cameron v. Abbott*, 30 Ala. 416; *Harris v. Carter*, 3 Stewart, 233.

W. E. & R. H. CLARKE, with THOS. W. COLEMAN, *contra*. The mortgage was given to secure an existing indebtedness, and to procure an extension of the time of payment; and any promise as to future advances, if proved to have been made, was without consideration.—*Overdeer & Aughinbaugh v. Wiley, Banks & Co.*, 30 Ala. 709. If any injury resulted from the breach of this promise, which is neither proved or alleged, the defendant had an action at law for damages. No equity being shown in favor of John M. Johnson, the bill was properly dismissed.—Cases cited in 1 Brickell's Digest, 750, § 1634.

STONE, J.—The mortgage, which is the foundation of the present proceedings, bears date March 31st, 1873. Hence, the homestead claim of John M. Johnson, if he owned and occupied the premises in controversy, is not governed by the act "to regulate property exempted from sale for the payment of debts," approved April 23d, 1873.—Pamph. Acts, 64. If he is entitled to a homestead exemption, it is to be measured by the constitution of 1868.—*Miller v. Marx*, and *Coleman v. Smith*, at December term, 1876.

2. The bill in the present case was filed in the name of four complainants. So far as John M. Johnson is concerned, the relief prayed rests on the averment, that his signature to the mortgage was procured by fraudulent representations, or assurances, of Agnew, one of the mortgagees. The exact averment is, that Agnew agreed, if the mortgage were made, he would advance to the said Johnson supplies to enable him to make a crop for the year 1873: that the mortgage was executed in consideration of this assurance, and that Murphy, Agnew & Co. had failed to furnish the promised supplies. There is no averment that complainant lost any thing by such failure, or that he was put to additional expense or inconvenience in procuring necessary supplies to enable him to make a crop. This, at most, amounted to a mere breach of agreement, which might, possibly, support an action at law, or sustain a plea of set-off, to the extent of the injury actually sustained. In the form in which it is here pleaded, it does not sustain the bill, so far as this complainant is concerned.—See *Overdeer v. Wiley, Banks & Co.*, 30 Ala. 709. It results that the bill was rightly dismissed, so far as John M. Johnson complained.

3. When several complainants unite in one bill, it is not enough that one or more may be entitled to recover. All must be entitled to relief, else none can obtain it.—1 Brick.

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Dig. 750, §§ 1634-5-6. This is fatal to the present bill, in its present form, whether the female complainants have made a case for equitable interference or not.

We need not inquire what would be our ruling, if a motion had been made in the court below to amend the bill by striking out the name of John M. Johnson as a complainant. No such motion is shown to have been made.

4. The mortgage, although shown in the proof, and substantially admitted in the pleadings, to have been signed only by John M. Johnson, and not by his sisters, nor by "some other person thereunto lawfully authorized in writing" (Code of 1876, § 2121), nevertheless has a certificate of a justice of the peace attached to it, certifying the acknowledgment of the execution of the conveyance by all the persons whose names are attached to it, strictly according to the statute.—Code of 1876, § 2158. As we understand the testimony, this acknowledgment was not in fact made by the female complainants. We are not prepared to say this does not create such a cloud on the title, as that chancery would entertain a bill to remove it, if only the proper parties were complainants.—*Lockett v. Hurt*, at December term, 1876. But the defense could also be made at law.

We need scarcely say that a certificate of acknowledgment of a conveyance, such as the mortgage in the present record, is a purely official act, and should never be given, in any case, unless it speaks the exact truth.

The decree of the chancellor is so far amended, as to make it a dismissal without prejudice; and, as amended, affirmed.

## Bickley v. Keenan & Co.

### *Statutory Action of Detinue for Mules.*

1. *Execution of conveyance; signature by mark; attesting witness.*—At common law, the signature to an instrument by mark only was valid, without attestation by a subscribing witness; and this principle is not changed by statute (Code of 1876, §§ 1, 2145), except as to conveyances of real estate, and other instruments which are required to be in writing.

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|----|-----|
| 60 | 293 |
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| 89 | 171 |

2. *Mortgage of personally.*—A valid mortgage of personal property may be made by words only, without writing; and if it is reduced to writing, though signed by mark only, attesting witnesses are not necessary to its validity.

3. *Registration of mortgage; effect as notice.*—A mortgage of personal property may be admitted to record, without acknowledgment, or proof of execution (Code of 1876, § 2153); and when so recorded, its effect as constructive notice is the same as if such acknowledgment or proof had been made.

[Bickley v. Keenan &amp; Co.]

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. WM. S. MUDD.

This action was brought by the appellees, suing as partners, against Thomas B. Bickley, to recover two mules, together with damages for their detention; and was commenced on the 18th November, 1874. The record does not show what pleas were filed; but the bill of exceptions states that the plaintiffs "waived all right to recover one of said mules, and the parties went to trial on issues joined as to the title to the other mule alone." The plaintiffs claimed the mule under a mortgage executed to them by one Frank Meredith, which was dated the 21st January, 1874, was signed by the grantor's mark only, attested by two witnesses, and admitted to record on the 22d January, 1874, but without acknowledgment or proof of execution; and they also adduced evidence tending to show that Malinda, the mother of said Frank, who set up some claim to the mules, being informed of the execution of said mortgage by Frank, verbally ratified and confirmed it; but, on the question of such ratification, the bill of exceptions says, the evidence was conflicting. The defendant also derived title under a mortgage executed by said Frank and Malinda, by the names of Frank and Malinda Elliott; which was signed by mark only, was without date or attestation, and was admitted to record, without acknowledgment or proof of execution, on the 5th April, 1873. "The plaintiffs objected to the reading of said conveyance as evidence to the jury, and the court sustained the objection; to which the defendant excepted. The defendant then offered to prove that said Frank and Malinda did in fact execute said conveyance, by making their marks, and, in connection with this evidence, again offered to read said conveyance to the jury; but the plaintiffs objected, and the court sustained their objection; to which the defendant excepted." The bill of exceptions states, also, that "there was no evidence as to whether or not said Frank and Malinda could write their names."

The rulings of the court on the evidence, with other matters, are now assigned as error.

J. B. MOORE, for appellant.

WM. COOPER, *contra*.

BRICKELL, C. J.—The ground of objection, or the reasons influencing the court to the exclusion of the mortgage, accompanied by evidence of its actual execution, are not stated in the bill of exceptions. The sufficiency and fairness



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of its consideration does not appear to have been matter of dispute; and if it had been, it would not have justified its exclusion as evidence, whatever instructions to the jury may have been required in reference to it. Prior in point of time of execution, and of registration, if valid and operative as a conveyance, it passed to the defendant a title superior to that created by the mortgage to the plaintiffs, and was a full defense to the present action. The only ground of objection suggested by the argument of counsel, to its admissibility as evidence, is the manner of its execution—that the mortgagors sign by mark only, and their signatures are not attested by a subscribing witness, nor were they acknowledged before, and certified by, an officer having authority to take and certify the acknowledgment of conveyances. The objection is founded on the definition of the words “signature” or “subscription” given by the first section of the Code. This and several succeeding sections declare the meaning of particular words used in the Code; and among others it is said: “Signature, or subscription, includes mark, when the person can not write; his name being written near it, and witnessed by a person who writes his own name as a witness.”

A subscription or signature to any instrument by mark, at common law, is sufficient; and if it is not an instrument, the execution of which must be attested by a witness or witnesses, the absence of an attestation would not detract from its sufficiency, though proof of execution, when it becomes necessary to prove it, is thereby rendered more difficult.—*Baker v. Dening*, 8 Ad. & Ell. 94; 3 Wash. Real Prop. 244; *Wimberly v. Dallas*, 52 Ala. 196; *Bailey v. Bailey*, 35 Ala. 687. The statutory provision we are considering does not negative expressly the validity of instruments signed or subscribed by mark, and not attested; yet, as it introduces a new rule in reference to subscriptions or signatures, we think it must be construed as implying a negative of the sufficiency of unattested signatures or subscriptions by mark, of all instruments falling within its purview. When a statute limits a thing to be done in a particular manner, it includes in itself a negative; and the negative is, that it shall not be done otherwise. The limitation exists, whenever the statute prescribes the particular manner in which the thing must be done.—1 Kent, 467, marg. note; Sedgwick's Stat. & Const. Law, 31; Potter's Dwarrris, 72. On this principle, we held in *Hendon v. White*, 52 Ala. 597, and in subsequent cases, a conveyance of lands is not effectual to pass the legal title, unless attested by one, or, where the grantor can not write, by two witnesses, or acknowledged before a proper officer. Such are the requisitions of the statutes. They define the

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constituents of a conveyance of lands; but they do not define the constituents of any conveyance of personal property, whether it is absolute or conditional. That such conveyances may, and will in the course of the transactions of the community, be made, and will be in writing, the statutes recognize, and authorize the registration of such conveyances in particular instances. The mode of executing them—whether they shall be under, or without seal; what shall be the operation of any covenant they contain; the manner of subscribing or signing them, nor any other constituent of their creation, is defined or declared. The manner of creating such conveyances, or of making transfers of personal property, is controlled entirely by the common law.

The statutory definition of *signature* or *subscription* is limited to these words when used in the Code, and to instruments or contracts, which the Code, or some statute not incorporated in it, requires to be signed or subscribed. The agreements which, under the statute of frauds, are void if not in writing, must be *subscribed by the party to be charged, or some other person by him thereunto lawfully authorized in writing*. There are other instruments, also, required to be subscribed or signed. To all these, the statutory definition of subscription or signature extends. It does not extend beyond the use of the words in the Code, or in other statutes which must be construed as if they were a part of it. Contracts, or instruments, the constituents of which are to be ascertained wholly from the common law, are not included by the language of the statute, nor in its spirit or purpose. The mortgage, though executed by mark only, and not attested by witnesses, was a valid conveyance. The title to personal property may pass with or without writing; and if by writing, witnesses to its execution are not essential.—*Morrow v. Turney*, 35 Ala. 131.

Mortgages of personal property, to be operative against subsequent purchasers, or creditors without notice, must be recorded. Proof of their execution, or an acknowledgment of it, is not indispensable to registration. It may be made without either, and operates as notice of their contents.—Code of 1876, § 2153. The registration of the mortgage to the defendant was properly made, and affected the plaintiffs with notice of its contents. The Circuit Court erred in not permitting it to be read in evidence, on proof of its execution. It is not necessary to notice any other of the rulings of the court, as they may not arise on another trial.

The judgment must be reversed, and the cause remanded.

[Horn v. Wiatt.]

## Horn v. Wiatt.

### *Bill in Equity by Creditors, to set aside Fraudulent Conveyance.*

1. *Homestead exemption; governed by what law; extent and value, in 1858*—Under the statutory provisions as to homestead exemptions which were of force in 1858, and which determine the right of exemption as against debts then contracted, the exempt homestead could not exceed eighty acres in quantity, nor \$500 in value; and these statutes were repealed by the act approved April 23, 1873, and so continued until re-enacted, as to such debts, by the act approved February 9, 1877; the effect being that, during the interval of nearly four years, there was no exemption as against debts contracted prior to the constitution of 1868.

2. *Fraudulent conveyance.*—A deed by which a father conveyed all his property to his son, on a recited consideration of \$8,000, held fraudulent and void as against creditors, on the facts proved in this case, notwithstanding the denials of the answers; the question of fraud *vel non* having been submitted by the chancellor to a jury, whose verdict against the validity of the deed he approved, and his decree being here affirmed.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 12th January, 1874, by Isaac W. Horn and Elizabeth McMillan, judgment creditors of William C. Wiatt, against the said William C. Wiatt and his son, John F. Wiatt; and sought to set aside a conveyance of his property by said William to said John F. Wiatt, on the ground that it was intended by both of them to defraud, hinder, and delay the creditors of the grantor, and to subject the property to the payment of the complainants' debts. Horn's judgment was rendered on the 16th October, 1873, was for the sum of \$628.92, besides costs, and was founded on a promissory note executed in 1858. Mrs. McMillan's judgment, which was for the sum of \$1,765.53, besides costs, was also rendered on the 16th October, 1873, and was founded on a promissory note, dated May 14, 1858, and payable one day after date. An execution was regularly issued on each of these judgments, on the 3d November, 1873, and returned "No property found." The deed which the bill sought to set aside, a copy of which was made an exhibit, was dated the 6th January, 1866; recited a consideration of \$8,000, cash in hand paid; conveyed, with full covenants of warranty, a tract of land containing six hundred and ten acres, more or less; was signed by said W. C. Wiatt and his wife; was acknowledged by Mrs. Wiatt, before a justice of the peace, on the 6th February, 1866, and by said W. C.



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Wiatt on the 2d October, 1866. The bill alleged that this conveyance was without consideration, and was executed with the intent to hinder, delay, and defraud the creditors of the said W. C. Wiatt; that the said John F. Wiatt had full knowledge of this fraudulent intent on the part of his father, and aided and participated in its execution; that he was a young man, without money or resources, living with his father, and assisting in the cultivation of the land; also, that the said W. C. Wiatt, at or about the same time, and with the same fraudulent intent, conveyed all his personal property of every kind, including an unknown number of bales of cotton, to the said John F. Wiatt, by a pretended sale, or other fraudulent arrangement; and that these conveyances embraced all of the grantor's property. The bill prayed a discovery and account as to the personal property, and asked that the conveyances might be set aside as fraudulent and void, and the property be condemned to sale for the satisfaction of the complainants' judgments; and the prayer for general relief was added.

An answer on oath, as to the allegations of the bill, was waived, but required as to the interrogatories; and the defendants answered accordingly, denying the allegations of fraud, and insisting on the *bona fides* and validity of the conveyances. In answer to the interrogatories they stated, in substance, that the contract between them was a sale and purchase of all the property then owned by the said W. C. Wiatt; that the consideration recited in the deed, \$8,000, was the fair value of the property, and was paid in cotton, fifty-six bales being delivered; that there were about twenty-six bales of cotton on the place at the time of the sale, which W. C. Wiatt had subscribed to the government of the Confederate States, and which were carried off by Federal agents; that John F. Wiatt, besides helping his father in the cultivation of his land, kept a warehouse at Moscow, and was engaged in packing cotton for government officials; and that he had acquired about seventy bales of cotton, which were then in Mobile, and a part of which, fifty-six bales, was paid to his father for the land and other property.

On final hearing, on pleadings and proof, the only question being the validity of the conveyance, the chancellor had a jury impaneled, and submitted to them the question of fraud *vel non*; and the jury having found that the conveyance was made with the intent on the part of W. C. Wiatt to hinder and defraud his creditors, and that John F. Wiatt participated in this fraudulent intent, the chancellor approved their finding, and rendered a decree for the complainants; setting aside the deed, and ordering the lands

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to be sold by the register for the satisfaction of the judgments. But the chancellor added to his decree this paragraph: "Paragraph 8. It is ordered that, in case the register sells the lands, defendant W. C. Wiatt may claim an exemption of \$500 in said lands; and if said claim be made according to law, the register shall omit said exemption from sale." Said Wiatt thereupon filed his petition, addressed to the register, claiming a homestead exemption in the lands, and asking the appointment of commissioners to set it apart; and commissioners were accordingly appointed, who reported that they had allotted to him two hundred and ten acres, of the value of \$500. The record does not show any action whatever on this report, either by the register or by the chancellor.

The complainants now appeal from the chancellor's decree, and assign as error that part which allowed W. C. Wiatt to claim an exemption in the lands. John F. Wiatt also appeals, and assigns as error the decree setting aside the conveyance from W. C. Wiatt to him. The two cases were argued and submitted together.

SNEDCOR & COCKRELL, for the complainants.

THOS. B. WETMORE, *contra*.

STONE, J.—The decree of the chancellor in this cause was rendered May 27, 1876. In it he ordered, "that in case the register sells the lands, defendant W. C. Wiatt may claim an exemption of \$500 in said lands; and if said claim be made according to law, the register shall omit said exemption from sale." This is the first time exemption or homestead is mentioned in the proceedings, although the bill was filed January 12, 1874. Under this order of the chancellor, W. C. Wiatt filed his sworn petition, addressed to the register, dated and filed June 26, 1876, in which he claimed homestead of eighty acres, and prayed the appointment of commissioners, disinterested freeholders, to lay it off. The commissioners were appointed by the register, July 17, 1876; and on the 22d of the same month, they reported to the register that they had allotted to the petitioner the lands he asked for, embracing the homestead, and an additional one hundred and thirty acres, making two hundred and ten acres. These proceedings were never brought to the notice of the chancellor, so far as we are informed, and have never received his approval or disapproval. We consider it unnecessary to comment on the irregularity of these proceedings.

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The debts on which the judgments were recovered, which the present bill seeks to enforce, were contracted in 1858, and the homestead exemption must be graduated by the law as it then stood.—See *Wilson v. Brown*, at present term; *Taylor v. Anthony*, December term, 1876. In 1858, the homestead exemption was governed by section 2462 of the Code of 1852, as amended by the act of February 12, 1858—Pamph. Acts, 48. The homestead then exempted was in quantity not to exceed eighty acres, and in value not to exceed \$500. The quantity was increased, provided the value did not exceed \$500, to three hundred and twenty acres, by the act of January 30, 1860; and these several statutes are embodied in section 2880, subdivision 4, of the Revised Code.

But, when the present case was decided, and when the application was made and granted for homestead allotment, all statutes granting homesteads, prior to the enforcement of the constitution of 1868, had been long repealed. See section 17 of the act “to regulate property exempted from sale for the payment of debts,” approved April 23, 1873; Pamphlet Acts, 64. Thus the law stood, until those statutes were re-enacted, February 9, 1877, and made applicable to debts contracted before the State constitution of 1868 became operative. It is thus shown that, for near four years, there were no statutes in force in this State securing homesteads from seizure and sale under execution, provided the debt or liability was older than the constitution of 1868. This results from certain plain principles. Exemption only exists by virtue of the law. It is given by the law, and can be taken away by the law. And when the law which confers it is repealed, the right fails, for it has nothing to uphold it.—See *Boyd v. Harrison*, 36 Ala. 533; *Ware v. Owens*, 42 Ala. 212; *Daily v. Burke*, 28 Ala. 328. And, under the rulings of this court, following the decision of the Supreme Court of the United States, any material increase of exemption of property from the payment of debts, is unconstitutional, and inoperative as against debts previously contracted, because its tendency is to impair the obligation of the contract.—See *Gunn v. Barry*, 15 Wallace, 610; *Wilson v. Brown*, at the present term; also, *Nelson v. McCrary*, at the present term.

It results from what we have said, that that portion of the chancellor's decree which we have copied above is erroneous, and it is here vacated and annulled. In all other respects, his decree is affirmed. It results, also, that the proceedings had before the register, on the petition to have homestead allotted, are, in all respects, irregular.



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We concur with the chancellor in holding that the deed from W. C. Wiatt to John F. Wiatt was made with intent to delay, hinder, and defraud the creditors of the former, and that the latter knew of such intention, and contributed to its consummation. The testimony intended to prove the consideration, considered in connection with the account with Sims, Houston, Sims & Vidmer, and Harrison & Co., falls very far short of proving an actual and *bona fide* bargain and sale from father to son; and the other testimony weakens much the Wiatts testify to, and tends strongly to show the transaction was simulated and fraudulent.

On the appeal by the complainants, the decree of the chancellor is reversed, and a decree here rendered, as above indicated, at the cost of W. C. Wiatt. On the appeal by John F. Wiatt, the decree of the chancellor is affirmed.

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### *Statutory Action in nature of Ejectment.*

1. *Common law and English statutes; how far of force here.*—The ancient common law of England, in its entirety, never prevailed here, but only such parts of it as were not inconsistent with our institutions and public policy, as deduced from statutory and constitutional provisions; and English statutes, enacted prior to the immigration of our ancestors to this country, prevailed to the same extent, as a part of that common law.

2. *Liability of lands to payment of debts.*—The subjection of lands by legal process to the payment of debts is not, in Alabama, the mere consequence of statutory remedies, which the legislature may wholly take away, or practically abrogate. The statute of 13th Edw. 1, ch. 18, which gave a judgment creditor a writ of *elegit* against his debtor's lands, was in force here, as a part of the common law, during the five years of organized government which preceded its re-enactment in substance by the act of 1807 (Clay's Digest, 199, § 1). The settled law and policy of the State has always been to subject lands, equally with personal property, to the payment of debts; and while the legislature may change, modify, or enlarge existing statutory remedies, it cannot, without violating the Federal constitution, take away all remedy for the enforcement of existing contracts, nor substitute new remedies which impair the value and benefit of such contracts.

3. *Homestead exemptions; governed by what law.*—The right to a homestead exemption, as against the claims of creditors, is to be determined by the law which was of force when the debt was contracted, and not by a subsequent law which was of force when the property was acquired: such subsequent statute, when enlarging homestead exemptions, can not operate on existing contracts without impairing their obligation.

4. *Same.*—As to debts contracted after its adoption, the constitution of 1865 superseded all former exemption laws, and governed all homestead rights until the passage of the act approved April 23, 1873, which enlarged the homestead from eighty to one hundred and sixty acres; but, as against debts contracted in 1872, this statute can not apply, so as to give the enlarged homestead in lands acquired after its passage.

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| 60 | 301 |
| 60 | 300 |
| 62 | 45  |
| 63 | 237 |
| 63 | 264 |
| 63 | 417 |
| 65 | 39  |
| 66 | 76  |
| 67 | 309 |
| 68 | 247 |
| 70 | 256 |
| 71 | 145 |
| 72 | 501 |
| 73 | 31  |
| 75 | 426 |
| 76 | 548 |
| 77 | 471 |
| 90 | 467 |

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5. *Sale of lands under execution, subject to claim of homestead exemption.*—The statute regulating the assignment of a homestead, when claimed by a defendant in execution (Rev. Code, § 2881), applied only to the homesteads which were exempted by the laws of which it was a part, and was directory merely: a failure on the part of the sheriff to comply with its provisions was a mere irregularity, which might be a ground for an application to set aside the sale, but did not invalidate the title of the purchaser, who bought subject to the claim of a homestead exemption.

6. *Cross assignments of error.*—In a case at law, there is no rule of practice, which allows the appellee to assign errors on the record, on account of adverse rulings of the court below shown by the appellant's bill of exceptions.

### APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEORGE H. CRAIG.

This action was brought by James W. McCrary, John E. Love, and William G. Miller, against Jabez C. Nelson, to recover the possession of a certain tract of land, containing one hundred and forty acres, which was described in the complaint as "the north half of the south-west quarter of section fifteen (15), and the south-west quarter of the north-west quarter of section fifteen (15), and the east half of the south-east quarter of the north-east quarter of section sixteen (16), in township nineteen (19), range four (4) east;" together with damages for its detention. The defendant pleaded "not guilty, in short by consent, with leave to give in evidence any special matter in bar;" and the trial was had on issue joined on this plea.

The plaintiffs derived their asserted title to the land under a purchase at sheriff's sale, made on the 31st July, 1876, under two executions against the defendant, hereinafter more particularly described; and they produced and proved the sheriff's deed, the executions with their levies, the judgments on which the executions were issued, and the debts on which the judgments were founded. The defendant claimed the land as a part of his homestead exemption, and also insisted that the sheriff's sale and deed were void. One of the two judgments, under which the land was sold by the sheriff, was in favor of said James W. McCrary; was rendered on the 3d April, 1873, for \$278.96, and was founded on the defendant's promissory note for \$258.24, dated the 25th March, 1872. An execution on this judgment was issued on the 29th April, 1873, which was returned "No property found;" and an *alias* was issued on the 6th June, 1876, which was levied on the land in suit. The other judgment was in favor of said John E. Love and William G. Miller, and was rendered on the 21st April, 1876, for \$430.17, the balance due on a promissory note, signed by the defendant (with two others), and dated the 15th October, 1872. An execution was issued on this judgment on the 18th May, 1876, and was levied on the lands in

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controversy. Besides the lands now sued for, said executions were at the same time levied on another tract containing twenty acres, on which were situated the defendant's dwelling-house, out-houses, etc., and which was described in the levy as "the south half of the north-east quarter of the south-east quarter" of said section sixteen. The lands levied on, containing in all one hundred and sixty acres, were sold and conveyed to said defendant by James W. Locke and wife, by deed dated 22d December, 1874, which recited a consideration of \$2,500. They lay in one contiguous tract, except that the twenty-acre parcel, on which the buildings were situated, was separated from the other portions by a tract containing forty acres, which belonged to the defendant's wife; and, with said forty acres, making two hundred acres in all, were used and cultivated by the defendant as his homestead farm or plantation, on which he also resided. There were no houses, or buildings of any kind, on any part of the land sued for, all the improvements being placed on the twenty acres on which the dwelling-house was situated.

The executions were levied on the 7th June, 1876; and on the 14th June the defendant filed with the sheriff an affidavit and claim of exemption to the lands, as "exempt to him under the constitution and laws of Alabama, as an actual *bona fide* resident and the head of a family." On the 31st July, 1876, the day of the sale, the defendant read to the crowd a written notice, forbidding the sale, and asserting his claim to the lands as his homestead exemption; claiming eighty acres of the tract, which were described by their numbers, as exempt under the constitution, and the other eighty acres as exempt under the act approved April 23, 1873. The sheriff proceeded with the sale, and sold the entire tract of land, dividing it into two parcels of eighty acres each; and the plaintiffs in execution became the purchasers of each tract, at the price of \$5.00 for the parcel which included the dwelling-house, and \$50.00 for the other parcel. The sale was declared to be made "subject to all claim of exemption by the said J. C. Nelson under the constitution and laws of Alabama," and was so expressed in the sheriff's deed to the purchasers. The value of the entire tract, comprising the twenty acres on which the houses were situated, was estimated by the witnesses at from \$1,600 to \$2,000.

The above being, in substance, the material facts disclosed by the evidence, several charges in writing were requested by each party, some of which were given by the court, and others refused; each party reserving exceptions to the refusal of the charges asked by himself, and to the charges given at the instance of his adversary. The charges to which excep-



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tions were reserved by the defendant, and which he here assigns as error, instructed the jury, in effect, that the constitution of 1868 repealed all exemption laws then of force, except as to existing debts; that the constitution only exempted eighty acres as a homestead, and was the only exemption law in force up to the passage of the act approved April 23, 1873, except as to debts existing when that constitution became operative; that the said act of 1873, enlarging the homestead to one hundred and sixty acres, did not apply as against debts created prior to its passage, although they were reduced to judgment after its passage; and that the failure of the sheriff to have the homestead appraised and set apart by metes and bounds, under the claim of exemption, was a mere irregularity, which did not invalidate the sale, and was not available in defense of this action. Under the charge of the court, the jury returned a verdict for the plaintiffs for eighty acres of land.

WM. G. JONES, for the appellant.—1. In the consideration of cases involving questions of homestead exemptions, two cardinal principles should be kept constantly in view, and properly applied: 1st, that by the common law lands were not subject to levy and sale under legal process for the collection of debts; 2d, that exemption laws are liberally construed in favor of the debtor. The first proposition is too well settled to require argument.—3 Bla. Com. 418, mar. p.; 2 Washburn's Real Property, 26, 27; 4 Howard, 71; *Hendon v. White*, 52 Ala. 601; 3 Ala. 560; 11 Ala. 995; 1 Brickell's Digest, 899, § 131. For the rule as to the liberal construction of exemption laws, which is equally well settled, both here and in other States, see *Watson v. Simpson*, 5 Ala. 233; *The State v. Johnson*, 12 Ala. 840; *Ross v. Hannah*, 18 Ala. 125; *Favers v. Glass*, 22 Ala. 621; *Allman v. Gann*, 29 Ala. 242; *Webb v. Edwards*, 46 Ala. 23; *Freeman on Executions*, § 208, and cases there cited; *Smyth on Homesteads*, 49-54, §§ 2-11.

2. The constitution of 1868 repealed by implication all laws then existing which were repugnant to its provisions; but the laws then existing, exempting homesteads in the country from levy and sale under execution, were not repugnant to any of its provisions, and were not repealed by it. The convention which framed that constitution certainly did not intend to repeal by it all existing exemption laws, and did not suppose that it had done so; else why adopt, on the next day, an ordinance expressly repealing the exemption laws then in force? This ordinance shows the construction which the convention itself put on the constitution, and their

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intention in adopting it, though it may have had no validity as a repealing law; and it was itself repealed—1st, by implication, by the act of July 29, 1868, adopting all the laws in the Code not in conflict with the constitution; and, 2d, by express words, by the act approved December 1, 1868. In *Miller v. Marx*, and other recent cases, this court has decided that the homestead exempted by the constitution may be enlarged by the legislature; and it was enlarged by the adoption of the laws contained in the Revised Code, which gave three hundred and twenty acres in the country to every head of a family, as the defendant was in 1872. Besides, the repeal of the repealing ordinance, by operation of law, revived the laws which had been repealed by it.—1 Kent's Com. 515-16, mar. p.; Potter's Dwaris, 159. This court, in the cases above referred to, decided that section 2061, subdivision 6, and section 3539 G, Revised Code, were repugnant to the constitution of 1868, and were repealed by it, but said nothing about sections 2880 and 2884; and these latter sections were expressly mentioned and repealed by the act approved April 23, 1873, which clearly shows that the legislature considered them as then of force. These laws being of force in 1872, when the plaintiffs' debts were contracted, if the subsequent act of 1873 does not apply to the case, determined the extent of the homestead right; and the court erred in holding that it was governed only by the constitution of 1868.

3. But the act of April 23, 1873, applies to debts previously contracted, and is not unconstitutional. It is a reasonable exemption law, passed in good faith, and affects only the remedy. No case can be found, which holds such a law to be unconstitutional. It is sustained on the same principle which applies to statutes of limitations, laws abolishing imprisonment for debt, changing the rules of evidence, regulating attachments, and others, which affect the remedy only. Cooley on Constitutional Limitations, 1st ed., 287-8; Smyth on Homesteads, &c., 61-69, and cases there cited; *Bronson v. Kinzie*, 1 Howard, 311; 6 Howard, 301; *Van Hoffman v. Quincey*, 4 Wallace, 552; *Sneider v. Heidleberger*, 45 Ala. 126-34; *Garrett v. Chesire*, 69 N. C. 397. The principle is well settled, that State legislatures may pass remedial laws, changing, modifying, and regulating the remedies on contracts; that such laws do not impair the obligation of the contract, within the prohibition of the Federal constitution, and that they apply to future remedies on debts previously contracted. If, under the false pretense of regulating the remedy, a State law attempts, in effect, to take away a lien which a creditor has already acquired, or to deprive him of



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all remedy for the collection of a pre-existing debt, such law impairs the obligation of his contract, and is void. But, if a law is passed in good faith, to regulate future remedies, making a reasonable exemption for an impoverished debtor, and leaving a substantial remedy to the creditor, it will be sustained, and applied to existing debts. The intent and reasonableness of the law, to be gathered from itself and the circumstances under which it was passed, are the test of its constitutionality; and a judicious application of this test will reconcile most of the conflicting decisions on this question.

Submitted to this test, the cases of *Gunn v. Barry* (15 Wallace, 610), and the *Virginia Homestead Cases* (22 Grattan, 266), were correctly decided. In the former case, from Georgia, the debtor was in possession of the land in 1866, when his creditor recovered judgment against him; which judgment was, by the laws of Georgia, a lien on the land. The land contained about two hundred and seventy acres, and was worth about \$1300; and the exemption law allowed the debtor to claim fifty acres as the head of a family, and five acres additional for each child under sixteen years of age, but not exceeding in all \$200 in value. By the constitution of 1868, and laws passed under it, the homestead exemption was extended from \$200 to \$2,000 in value, and was unlimited in quantity. Of this law, the Supreme Court of the United States said: "Under the circumstances of this judgment, the effect of the act does not merely impair, it annihilates the remedy: there is none left." In Virginia, prior to 1870, there was no homestead exemption, and only a few articles of personal property were exempt; while the constitution of 1870, and laws passed under it, exempted all the debtor's property, real and personal, to the amount of \$2,000; and the law was held invalid, as to existing debts, on account of this enormous and excessive increase. Unlike the Georgia and Virginia statutes, our act of 1873, in its practical effect, reduced the homestead in all cases where the value of the land was less than \$12.50 per acre, and only increased it in the comparatively few cases where the land was worth more than that sum. For, under the laws which were repealed by that act, three hundred and twenty acres were exempted, not exceeding \$1700 in value; while that act reduced the exemption to one hundred and sixty acres in extent, without limit as to value. Statistics show that the average value of the lands throughout the State is much less than \$12.50 per acre; so that this law, in its practical operation, was highly beneficial to creditors in a great majority of cases, and largely increased their remedies. How, then, can it be held that the intention



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of the legislature in passing that act, or the act itself, in its practical effect, is to impair the obligation of contracts, or abridge the creditor's remedy? It is not even necessary to invoke the principle, applied only in doubtful cases, that presumptions are to be indulged in favor of the good faith of the legislature and the validity of the law.

4. But the lands in this case were not acquired by the defendant until long after the passage of the act of 1873. The plaintiffs had no lien on them, and they can not be supposed to have given credit to the defendant in 1872, on the faith of lands which he did not then own, never had owned, and might never own. This court held, in *Miller v. Marx*, and other cases above referred to, that the changes made by the act of 1873 "operate on all homestead exemptions which have accrued since April 23, 1873"; which is decisive of this case. No case can be found in the books, which holds a homestead, acquired after the passage of a law exempting it from levy and sale under execution, liable to such levy and sale for debt, whether contracted before or after the passage of the law. In all the cases cited to the contrary, the debtor had owned the lands at the time the debt was contracted, or before the passage of the law creating or increasing the exemption.

5. A part of the land levied on was undoubtedly exempt, and the defendant's claim to at least twenty acres, including the dwelling-house, is admitted. The claim of exemption was regularly made and filed, and notice thereof was given at the sale. It was the duty of the sheriff, under these circumstances, if he thought the claim legal and valid, to recognize it, and refuse to sell; or, if he thought the claim excessive, then to summon there disinterested freeholders to value the land, and, if necessary, to set apart the homestead by metes and bounds. Failing to do this, the sale is void, and passed no title to the purchaser.—*Freeman on Executions*, 462-67, 475, 545; *DeLoach v. State Bank*, 27 Ala. 437-45; *Ronkenulorf v. Taylor's Lessee*, 4 Peters, 349, 363; *Henry v. Mitchell*, 32 Mo. 512; *Dearmond v. Courtney*, 12 La. Ann. 251; *Gantley v. Ewing*, 3 Howard, 707; *Smith v. Cockrill*, 6 Wallace, 756; *Vogler v. Montgomery*, decided by the Supreme Court of Missouri, January, 1874, and reported in *Central Law Journal*, vol. 1, p. 65; *Collier v. Stanbrough*, 6 Howard, 14. As to the exempt portion of the land, there can be no doubt that the sale was void—that the sheriff had no more power to make the levy or sale, than if the property had belonged to a third person. It is not a mere irregularity in the exercise of a lawful power, but an utter want of any power or authority whatever; and if the exempt property had been personal,

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the defendant might have maintained trespass or trover against the sheriff, or trover or detinue against the purchaser.—5 Ala. 233 ; 9 Ala. 469 ; 18 Ala. 125 ; 22 Ala. 621 ; 37 Ala. 350 ; 29 Ala. 240 ; 42 Ala. 226 ; 45 Ala. 454. As to the residue of the land, the sale was void for indefiniteness and uncertainty, and for the failure to comply with express statutory provisions, as shown by the authorities above cited. Public policy, which all statutory provisions are intended to effectuate, requires that, in making sales under judicial process, every thing should be done which is necessary to make the property bring a good price, and thus prevent such a sacrifice as is shown by the record in this case.

THOS. J. SEAY, *contra*.—1. “The homestead exemption provided in the constitution, from debts contracted after its adoption, is incompatible with that provided for by the Revised Code, section 2061, subd. 6, and section 353.” *G. The two can not stand and be administered together. The constitution repealed all previous statutory homestead exemptions from debts contracted after its adoption.*”—*Miller v. Marx*, and *Anthony v. Anthony*, at the last term. Sections 2880 and 2884, on which the appellant here relies, are not expressly mentioned in this extract from the opinion of this court, but they fall within the same principle, and must be held repealed by the constitution of 1868 ; and they were expressly repealed by the act of April 23, 1873, and were not even operative as to debts contracted prior to the adoption of the constitution of 1868 when the sale in this case was made.

2. The exemption laws which are in force at the time a debt is contracted, become a part of the contract itself, and adhere to it until the debt is paid ; and the homestead right, whenever it is claimed, is admeasured by that law.—*Miller v. Marx*, and *Anthony v. Anthony*, *supra*. That the property, in which the exemption is claimed, is acquired by the debtor after the passage of a subsequent law, does not change or affect the principle : it is the homestead right, and not a homestead in any particular tract of land, which the law regards as a part of the contract, and which can not be enlarged by subsequent legislation.—*Gunn v. Barry*, 15 Wallace, 610 ; *Grant v. Cosby*, 51 Geo. 460 ; *Page v. Page*, 50 Geo. 597 ; *Pryor v. Smith*, 4 Bush, Ky. 379 ; *Ladd v. Dudley*, 45 N. H. 61 ; *Laing v. Cunningham*, 17 Iowa, 510 ; *Bridgman v. Wilcut*, 4 Greene, Iowa, 563.

3. The defendant claimed the whole tract of land as exempt, and not any particular specified part of it ; and thus there was no case made for the appointment of appraisers to



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set apart the homestead. Moreover, the statute (Rev. Code, § 2881) does not apply to homesteads under the constitution; and if it did apply, the sheriff's failure to comply with it was a mere irregularity, which did not invalidate the sale.

BRICKELL, C. J.—It is certainly true that, by the ancient common law, personal estate only could be subject to the payment of debts. The reason was: "That it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men trusted one another no farther than they had visible chattels to answer the debt. The lands were not liable, because they were obliged to answer the duties to the feudal lord; and a new tenant could not be forced upon him, without his consent to the alienation; and the person was not liable, because that was obliged by the tenure to serve the king in the wars, and the several lords at home, according to the distinct natures of their tenure."—3 Bac. Abr. 663. The connection between the lord and the tenure—to secure the former the duties and services the fief bound the latter to render, and to prevent the transfer of these services and duties to another whom the lord had not accepted as a tenant, operated restraints on alienations by the act of the tenant, as well as by the acts of the law.—3 Black. Com. 419. This doctrine of the common law was never adapted to our condition, or to the nature of the tenure of real estate known to our laws, and was never a part of our jurisprudence. The common law of England is not, in all respects, the common law of this State. It was adopted, and prevails here, only so far as it is consistent with our institutions, and the public policy of the State, as deduced from our legislation.—*N. & C. Railroad Company v. Peacock*, 25 Ala. 229; *Barlow v. Lambert*, 28 Ala. 704; *Simpson v. State*, MSS.

The feudal restraints on the alienation of lands, and subjecting them to the payment of the debts of the owner, the growth of commerce compelled legislation in England to remove, long prior to the immigration of our ancestors to this continent. The statute of 13th Edw. 1, chap. 18, gave a judgment-creditor a writ of *elegit*, by which the sheriff was required to extend to him one half the debtor's lands, to be retained until the debt was satisfied.—3 Black. Com. 419. The principle is well settled, that English statutes, passed before the emigration of our ancestors, so far as consistent with our institutions and government, unless repealed, constitute a part of the common law prevailing in the States of a common origin.—*Carter v. Balfour*, 19 Ala. 814; *Horton v. Sledge*, 29 Ala. 478. If it were a matter of practical import-



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ance, there would be no room for doubt, that this statute was of force during the five years of organized government elapsing before it was in substance re-enacted by the act of 1807, Clay's Dig. 199, § 1. This was followed by the act of 1812, which subjected lands, tenements, and hereditaments, to levy and sale under execution, for the satisfaction of all judgments or decrees in courts of record; and the clerks of such courts were directed to frame the execution accordingly. Clay's Dig. 205, § 17. It seems to us, therefore, the assertion of a mere truism, that it is, and has been, the law of this State, to subject lands, equally with personal estate, to the payment of debts; and it is certainly true that, in the absence of exemption by constitutional or statutory provisions, the law appropriates to the payment of debts any and every beneficial interest of a debtor in property, real or personal, or in its use, whether the interest is legal or equitable, held jointly or in severalty.—*Rugely & Harrison v. Robinson*, 10 Ala 702. It is on the faith of this principle debts are now contracted, and not, as it is said they were in former times, on the faith of the visible chattels of the debtor. If parties are dealing fairly, the principle is in their contemplation, enters into, and forms part of the contract, as certainly as if it was expressed in terms; and it cannot be violated, without impairing the obligation of the contract. It is true, the legislature may change, alter, modify, or enlarge existing remedies; or it may abolish old, and substitute new remedies. Legislative power, in this respect, is subject to the restriction, that it cannot take away all remedy for the enforcement of existing contracts, nor substitute for former new remedies which impair the value and benefit of such contracts.—*Gunn v. Biddle*, 8 Wheat. 92; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Van Hoffman v. Quincey*, 4 Wall. 552; *White v. Hart*, 13 Wall. 646; *Walker v. Whitehead*, 16 Wall. 314; *Ex parte Pollard*, 40 Ala. 77. We can not, therefore, assent to the argument, that the subjection of lands by legal process to the payment of debts is merely statutory—the consequence of statutory remedies—and that without impairing the obligation of contracts the legislature may wholly abrogate the remedy, or narrow it so that the property liable at the time the contract is made is withdrawn from its satisfaction. If the subjection of lands to the payment of debts was dependent wholly on statutory provisions, the statutes having rendered them liable, it would not be competent for the legislature, by a repeal of such statutes, to remove the liability, nor to lessen it, to the prejudice of creditors whose rights had attached. The concession of such power to the legislature involves practically

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the power to nullify the contract, which the Federal constitution interdicts.

The question of chief importance in the present case is, whether the appellant's homestead exemption is to be measured and determined by the law in force when the debts on which the judgments rendered against him, for the satisfaction of which the lands were sold under execution, were contracted, or under the subsequent statute of April 23, 1873 (Pamph. Acts of 1872-3, p. 64), which was of force when the lands were acquired by the appellant, when the judgments were rendered, and at the sale by the sheriff. In the consideration of this question, the fact that the land was acquired subsequent to the making of the contracts, and after the enactment of the latter statute, is not material. The obligation of a contract is not limited to property which the man may own when he enters into it; nor is there any intendment, or implication, that he shall be discharged when such property is exhausted. In *Sturges v. Crowninshield*, 4 Wheat. 198, it is said by Ch. J. MARSHALL: "It is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund, which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." It is only through the agency of insolvent or bankrupt laws, that future acquisitions of a debtor may be relieved from liability for precedent debts.

This fact alone distinguishes this case from numerous cases recently decided in this court, which declare that a debtor's right of exemption is dependent on the law existing when the contract is made, and that without impairing its obligation subsequent legislation can not enlarge the exemptions of his property.—*Miller v. Marx*, at the last term; *Wilson v. Brown*, MSS. These decisions but follow the decisions of the Supreme Court of the United States, to which obedience is due from all State tribunals, on this and kindred questions.—*Gunn v. Barry*, 15 Wall. 610; *Edwards v. Kearzy* (6 Cent. Law Journal, No. 20); *Van Hoffman v. Quincey*, 4 Wall. 552; *White v. Hart*, 13 Wall. 646; *Walker v. Whitehead*, 16 Wall. 314. Before these decisions, the question may have been involved in doubt and uncertainty, by the conflicting decisions of the courts of the several States. It must now be accepted as the law, that the creditor may with confidence repose on the law as it is when he contracts, and learn from it the property which the debtor can claim as exempt, and the property he may through legal remedies condemn to



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its satisfaction—that while the legislature may modify, it can not deprive him of all remedy, nor, in the regulation of remedies, invade the obligation of the contract as it was made.

When these contracts were made, the constitution of 1868 was of force, and limited the homestead to eighty acres of land, and the dwelling-house and appurtenances thereon. The exemption laws existing prior to that constitution were, as to debts contracted subsequent to its adoption, superseded by it. They operated only in reference to debts contracted prior to the constitution, not on subsequent debts.—*Miller v. Marx, supra*. If they applied to subsequent debts, they would not avail the appellant, for they were repealed by the act of April 23, 1873, long prior to his claim of exemption, and the levy and sale by the sheriff. Exemptions are statutory, or constitutional, and the law conferring them must be of force when they are claimed. A law giving them, which has been repealed, is not, and can not be, revived by a claim under it, though it may have been of force when the contract was made. The act of April 23, 1873, enlarged the homestead exemption to one hundred and sixty acres, including the dwelling and appurtenances. It can not, without a violation of the constitution of the United States, operate on debts contracted prior to its passage.

When the sale was made by the sheriff, there was no mode provided for ascertaining and setting apart the homestead of a judgment debtor. The statute (R. C. § 2881) applied only to the assignment of the homestead exempt under the statutes of which it was a part. It was directory in its terms, and a failure to observe them would have been mere irregularity—ground for an application to vacate the sale, but not the subject of inquiry in an action by a purchaser at a sale by the sheriff for the recovery of the lands. The purchaser could, in such action, recover only the lands which were not exempt, if, prior to the sale, the debtor had selected and claimed the homestead. In the rulings of the Circuit Court, we find no error prejudicial to the appellant.

The appellees have introduced into the bill of exceptions, taken by appellant, various exceptions reserved by them on the trial, to the rulings of the court which diminished the recovery they claimed, and, without prosecuting an appeal, have assigned errors on these rulings. There is no rule of practice which authorizes such an assignment.—*Leslie v. Langham*, 40 Ala. 524; *Wright v. Evans*, 53 Ala. 103. We have not considered, and express no opinion in reference to these rulings of the Circuit Court.

The judgment is affirmed.



[Brown v. Leitch.]

**Brown v. Leitch.***Action on Promissory Note, by Payee against Maker.*

1. *Exemption of personal property; waiver of.*—The right to claim an exemption of personal property, secured to debtors by constitutional and statutory provisions, is a personal privilege, which the debtor may waive; and it is waived, under the laws existing on the 8th April, 1874, by a stipulation in a promissory note in these words: "In consideration of supplies furnished, for which this note is given, I hereby waive all right to exemptions under the laws of Alabama."

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2. *Form of judgment on note waiving exemption.*—Reversing the judgment of the court below, and holding that the waiver of exemptions contained in the note sued on, which was dated April 8, 1874, was valid, the court ordered the following words to be added to the judgment in favor of plaintiff: "And against this judgment, and the execution to be issued thereon, there is no exemption of personal property of the defendant."

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

This action was brought by S. & A. Brown, suing as partners, against H. B. Leitch; was commenced on the 24th February, 1876; and was founded on a promissory note, signed by the defendant, in these words: "Livingston, Ala., April 8, 1874. One day after date, I promise to [pay to] the order of S. & A. Brown one hundred and fifty 90-100 dollars, value received; negotiable and payable at Livingston, Alabama, with interest 10 per cent., from January 1, 1874; and in consideration of supplies furnished, for which this note is given, [I] hereby waive all right to exemptions under the laws of the State of Alabama." There was a demurrer to the complaint, which was overruled by the court; and the defendant then pleaded three special pleas: 1st, usury; 2d, that the note was executed prior to the statute authorizing judgments on notes waiving exemptions; 3d, that the note having been executed prior to the passage of the said statute, the plaintiff was not entitled to judgment on it as on a note executed after the passage of that statute. The plaintiffs confessed the plea of usury, and demurred to the other pleas, but the record does not show the action of the court on their demurrer. On the trial, as the bill of exceptions shows, the plaintiffs read the note to the jury, and it was the only evidence in the case. The court charged the jury, at the instance of the defendant, "that the defendant did not, by said note, waive all rights of exemptions as to personal property, so as

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to prevent him, when his property is levied on, from having the same exempted to him, by duly claiming the same as the law directs;" and that, the note having been executed prior to the passage of the act approved March 14, 1876, the third section of which prescribes the form of judgments on notes containing waivers of exemption (Code of 1876, § 2849), the plaintiffs were not entitled to have the waiver entered as a part of the judgment under the provisions of that act. These charges, to which the plaintiffs excepted, are now assigned as error. The jury returned a verdict for the plaintiffs, for the principal of the note, without interest; and the court thereupon rendered judgment in their favor, but refused to state in the judgment that the right of exemption was waived; and this refusal is also assigned as error.

Bragg & Thorington, and James Cobbs, for appellants.—Exemption laws confer a privilege on the debtor, which he may forfeit or waive; and a creditor may lawfully contract for such waiver. When thus waived, the waiver becomes a part of the contract, and the courts will enforce it. This right existed before the adoption of the present constitution, or the passage of the act of March 14, 1876; and the courts had the inherent right to modify and mould their process and orders, so as to make them conformable to law and justice.—Rev. Code, § 638; *Bibb v. Janney*, 45 Ala. 335; *Bell v. Davis*, 42 Ala. 460; *Ross v. Hannah*, 18 Ala. 125; *Pool v. Reid*, 15 Ala. 826; *Jordan v. Autrey*, 10 Ala. 276; Smyth on Homestead and Exemptions, §§ 526, 527, 535. The said act of March 14, 1876, is remedial only, and applies to actions pending at the time of its passage, as well as to actions subsequently commenced.—Code of 1876, § 2849.

CHAPMAN & SMITH, *contra*. (No brief on file.)

STONE, J.—When the note which is the foundation of the present suit was executed—April 8, 1874—the constitution of 1868, art. xiv., section 1, and the act "to regulate property exempted from sale for the payment of debts," approved April 23, 1873—Pamph. Acts, 64—defined the right and measure of exemptions. The language of the constitution is: "The personal property of any resident of this State, to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution, or other final process of any court, issued for the collection of any debt contracted after the adoption of this constitution." The language of the statute is: "That the personal property of any resident of this State, to the value of one thousand

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dollars, to be selected by such resident, shall be exempted from levy and sale under execution, or other process for the collection of debt." In *Miller v. Marx*, at December term, 1876, we decided, that the exemptions secured under the constitution of 1868 were constitutional legislation, and self-executing. There is no material difference in the clause of the constitution of 1868, and the section of the statute of 1873, copied above.

In the note sued on in this case is the following clause: "And in consideration of supplies furnished, for which this note is given, [I] hereby waive all right to exemptions under the laws of the State of Alabama." The appellant contends, that this waiver is valid as to the personal property of the debtor; and this presents the only question in this cause. It will be observed that the words, "to be selected by such resident," are found alike in the constitution and in the statute. The claim and selection must be made by the defendant himself; and if he fails to assert the claim, he thereby forfeits it.—*Ross v. Hannah*, 18 Ala. 125; *Gresham v. Walker*, 10 Ala. 370; *Bell v. Davis*, 42 Ala. 460. The right to claim personal property as exempt is a mere personal privilege.—*Mickles v. Tousley*, 1 Cow. 114; *Earl v. Camp*, 16 Wend. 563; *Smith v. Hill*, 22 Barb. 656; *Dodson's appeal*, 25 Penn. St. 232; *Eberhart's appeal*, 39 Penn. St. 509, 513; *Com. v. Boyd*, 56 Penn. St. 402.

In *Bowman v. Smiley*, 31 Penn. St. 225, the court said: "Notwithstanding the doubts which have been sometimes expressed, it is now generally conceded, that the statutory privilege of the exemption of a portion of his property, from levy and sale under execution, is one which a debtor may waive. When made at the time the debt is created, the waiver is based upon the same consideration as that upon which rests the liability to pay, and is therefore irrevocable. Such a waiver is a contract, that, so far as regards the judgment creditor in whose favor it is made, the debt shall be collectible in the same manner as if the act of April 9, 1849, had never been passed."

In *Bibb v. Janney*, 45 Ala. 329, a laborer had drawn an order, or bill of exchange, on his employer, to be paid out of his wages; and the question was, whether this was a waiver of his right to claim this sum due him for wages, as exempt under the statute. This court said: "The drawing of the bill of exchange on Janney, if not an absolute appropriation of the money due by him to the drawer, was at least a waiver of its exemption from application to his debts under legal process. Otherwise, it would open a door to fraud, and create distrust, which often would be as damaging to the



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debtor as to the creditor. What else can the debtor mean by drawing on his wages, than to declare to the person with whom he deals that he will not assert any existing right he may have to the funds, to the prejudice of his creditor, from whom he is then receiving a valuable equivalent?" And the claim of exemption was disallowed.—See, also, Smyth on Exemptions, § 535.

The exemption of personal property, under the provisions of the constitution and statute copied above, is to residents of this State. No other person than such resident is mentioned as having any interest in the exemption. It is manifest that the owner of such exempt personal property can sell, and thus part with such property, and no other person can gainsay his right. When the owner dies, his claim of exemption of personal property is not transmitted, but dies with him. True, if he has a wife or minor child, an independent right of exemption, in some conditions, springs up; but this is a right secured to such wife or minor child, not a continuance of the husband's right.—See *Childs v. Jones*, at present term. We think the waiver in the present case must be held valid and binding.

The judgment of the Circuit Court is reversed, and a judgment here rendered, adding to the judgment-entry this clause: "And against this judgment, and the execution to be issued thereon, there is no exemption of personal property of the defendant."

Let the appellee pay the costs of this appeal.

## Harkins v. Hughes.

*Bill in Equity against Executor, by Creditor of Testator's Widow.*

1. *Decedent's estate; creditor's remedy against executor or administrator.*—The remedy of creditors of a testator or intestate, to enforce payment of their debts out of his estate, is, exclusively, in the absence of equitable circumstances, by action at law against the executor or administrator in his official character; and the same principle applies to creditors of another person, whose debts are by the will charged on the testator's estate.

2. *Construction of will charging widow's debts on property.*—Where a testator bequeathed certain property, real and personal, to his wife for life, and on her death, "after defraying her funeral expenses and paying her just debts," to be equally divided among his three children, to whom the residue of his property was also bequeathed, charged with the payment of his own debts; held, that the debts of the widow were charged only on the property in which she had an

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estate for life, and not on the testator's estate generally, and that the executor could not be charged with them in his representative character.

3. *Executor's assent to legacy.*—When an executor assents to a legacy of an estate for life, and delivers the property to the person to whom it is thus bequeathed, this operates as an assent to the legacy of the remainder, and divests him of all title as executor; and if the property is delivered back to him on the death of the tenant for life, he holds it as bailee of the remaindermen, and not as executor.

4. *Right of retainer by executor.*—The executor has a right to retain, out of the assets which come to his hands, the amount of a debt due to him from the testator, or a debt due to him which is, by the terms of the will, charged on the property; and if, without retaining, he parts with the possession of the property, he cannot charge it with his debt in the hands of the person to whom he delivered it, without showing some excuse for his negligence and laches.

### APPEAL from the Chancery Court of Pickens.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 10th June, 1875, by R. J. Hughes, against Charles S. Harkins, as executor of the last will and testament of Archibald Hood, deceased, to compel the payment by said executor, out of the assets of said estate, of a debt which the complainant claimed to hold against Mrs. Martha A. Hood, deceased, who was the widow of said testator, for care and attention during her last illness, amounting to \$175. The testator died in said county, in March, 1871, and his last will and testament was there duly admitted to probate soon after his death. His will contained the following provisions: "*First*, I give and bequeath to my beloved wife, Martha A. Hood, the use and improvements of my dwelling-house, with all the furniture belonging thereto; also, my plantation, consisting of 529½ acres, more or less, embracing the place where I now live; also, I will and bequeath unto her two horses, or mules, as she may prefer; also, two cows and calves, and corn and meat, sufficient in quantity to support her twelve months after my death. I will and bequeath unto her, also, \$500 in money, to have and to hold the same to her for and during her natural life-time. *Second*, After my decease, if there should be a remainder after defraying all my funeral expenses, and paying my just debts, I will and bequeath that it be equally divided among my children; they to have and to hold to their heirs, executors, administrators, and assigns, forever. *Third*, After the death of my beloved wife, I will and bequeath, after paying her funeral expenses, and paying her just debts, the above-named property, set apart for her use and benefit during her natural life-time, the same, or the amount (?) thereof, to be equally divided between Mary W. Hood, William A. Hood, and Samuel F. Hood. *Fourth*, I will and bequeath that Mary W. Hood, William A. Hood, and Samuel F. Hood live with, and see that my wife is taken care of during her natural life-time. *Fifth*, I nominate C. S. Harkins to be the

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executor of this my last will and testament. In witness whereof," &c.

A copy of this will was made an exhibit to the bill, and the answer admitted that the exhibit was a correct copy; but, as set out in the transcript, the 4th item was entirely omitted, and is copied above from the bill; and the word "*amount*" in the 3d item, as copied from the exhibit, is written "*remainder*" in the bill. The bill alleged that Mrs. Hood, the widow, "after the death of her said husband, entered into the possession and enjoyment of some of the property bequeathed to her for life by her said husband, and held the same, or part of it, up to the time of her death, which occurred on the 30th September, 1873;" "that she remained upon the plantation, the use of which was bequeathed to her by her husband's will, until about the year 1872, when she removed to the house of complainant, where she continued to reside up to the time of her death;" that she found it necessary to make this change of residence," in order to obtain the care and attention her health and general condition required;" that the complainant and his family served and waited on her, supplying her wants, and bestowing all necessary care and attention during her last illness, which continued about seven months; that these services were worth \$175, and had never been paid; that he had presented his account to said executor, who refused to pay it. It was alleged, also, that the widow duly executed and published her last will and testament, which was regularly admitted to probate after her death, and of which the complainant was appointed the executor, and, in the discharge of his duty, "turned over to the said Harkins, as executor of said Archibald Hood, the property bequeathed to her for life by her said husband; that same Harkins received the same, and divided it among the legatees of said Hood; and said property, complainant claims, was charged with the payment of the just debts of the said Martha A. Hood." The prayer of the bill was, "that an account be taken of what is due and owing to complainant on said debt, and that the said defendant may be decreed to pay the same; that, if said defendant shall not admit assets of said testator sufficient to answer the same, then that an account may be taken of the assets and effects of said testator's estate which have been received by said defendant, and that the same may be applied in due course of administration; and that the trusts of said will may be required to be executed by the said defendant; and that the complainant's claim, debt, or charge, may be decreed to be paid to him, with all cost and expenses," &c.; and for other and further relief.



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The defendant demurred to the bill, for want of equity, for want of proper parties, and because complainant's remedy, if any he had, was at law; but the chancellor overruled the demurrer. The defendant also answered, admitting the execution of the will, and all the material facts above stated; alleging that he had not paid the complainant's debt or claim, because the testator's estate in his hands was not chargeable with it; and because the complainant ought to have retained for his debt out of the assets of the estate in his hands, before delivering the property to the legatees under the widow's will; and because the widow's estate was indebted to his testator's estate, on account of the \$500 in money, which he had delivered to her, and which had not been returned to him by her executor; and he pleaded this as an equitable set-off. He admitted that he had paid the physician's account, and the funeral expenses of the widow; and said that he did so, because the complainant had represented that her estate was not able to pay those debts. It is unnecessary to notice the evidence, or the questions of fact which were litigated before the chancellor.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant; and his decree is now assigned as error, together with the overruling of the demurrer to the bill.

M. L. STANSEL, for the appellant.—The funeral expenses and the debts of the widow were charged by the will, not on the testator's estate generally, but on the property which was bequeathed to her for life. Her executor had this property in his possession, and it was his right and duty to retain the amount of the charge on it which he now seeks to enforce out of the estate; and if he failed to do so, he can not now compel payment out of the testator's estate. His debt is extinguished by operation of law.—*Kimball v. Moody*, 27 Ala 130; *Glenn v. Glenn*, 41 Ala. 589; *Draughan v. French*, 4 Porter, 352-64; 2 Greenl. Ev. § 349.

L. M. STONE, *contra*.—The bill is not wanting in equity, being filed for the purpose of enforcing the trusts of the will, the payment of debts and charges, and marshalling the assets.—*Perry on Trusts*, 94, § 121; 12 Cush. 448; 23 Pick. 313; 2 Pick. 460; *Curtis' Eq. Pr.* 46, 47. The defendant accepted the trust, and he should be required to perform all the duties imposed.—2 *Story's Equity*, §§ 1065, 973; 19 Ala. 816, 259; 38 Ala. 695. Where the testator charges his lands with the debts of a third person, he will be regarded as having made them his own, and interest will be recoverable

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from his death.—Redfield on Wills, pt. 2, pp. 565–6; 16 Vesey, 393. The will shows, very clearly, an intention to charge the widow's debts on the testator's estate; and the defendant himself acted on this construction, in paying the funeral expenses and the doctor's bill. He cannot be allowed to discriminate, paying some of the debts, and repudiating others.

BRICKELL, C. J.—The bill was filed by the appellee, as a creditor of Martha A. Hood, deceased, the widow of Archibald Hood, deceased, against the appelliant as executor of the will of said Archibald, to compel him, from the assets of his testator, to pay the debt owing by said widow at her death. The will of Archibald Hood contains these clauses: The first is a devise of real estate, and a bequest of personal property, including five hundred dollars in money, to his widow, said Martha A., during her life; the second is a devise and bequest of the residue of his estate, after the payment of his debts and funeral expenses, and the setting apart to his widow of the property, real and personal, given her for life, to be equally divided between his children; and the third provides that, after the death of his widow, *and after defraying her funeral expenses, and paying her just debts*, the property given her for life should be equally divided between those persons who are named. The appelliant, as executor, assented to the devise and bequest to the widow, surrendering to her possession of the property, real and personal, and paying her the money bequeathed. After the death of the widow, the appellee, as her executor, without retaining for the debt due him from her, returned to the appelliant the property in which the widow had a life-estate, except the money, which may have been partially refunded; and he divided it among the remaindmen.

1. An executor, or administrator, is not suable in his representative capacity, unless it is on a claim or demand arising from the act or default of the testator, or intestate; or on claims and rights of distributees or legatees to participate in the distribution of the assets.—2 Redf. Wills, 251. The remedy of creditors of the intestate, or testator, against him, in the absence of special facts or circumstances rendering it inadequate, is exclusively in courts of law. It is certainly true that a testator may charge his estate with the debts of a third person, and a resort to equity may be necessary to enforce the charge. As this is the theory of the bill, we will inquire how far such charge has been created.

2. We can not assent to the argument, that the testator

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has converted the funeral expenses, and debts of the widow owing at her decease, into his own debts. If the argument was admitted, it would be fatal to the appellee's right of recovery in the present suit. The remedy would be against the appellant at law, in his representative capacity; and, so far as appears, that remedy would be adequate, excluding equitable interference. The funeral expenses and debts of the widow are charged on the property in which she had a life-estate, and the residue of the estate—that which passes to the testator's children under the second clause of the will—is not subject to the charge. The testator contemplated the existence of such residue, and subjects it to no other charge than the payment of his own debts and funeral expenses. The gift to his children is of an entire, not a partial interest, and there is no indication of any purpose to postpone its possession or enjoyment until the death of the widow. Nor is there any indication of a purpose to subject it to diminution or exhaustion by any act of the widow, as it would be if it was charged with the payment of her debts and funeral expenses. This residue is that part of the testator's estate remaining after the payment of his debts and funeral expenses, and after the property, real and personal, devised and bequeathed to the widow for life, has passed to her, and vested in possession. The remainder in the property devised and bequeathed the widow for life can not, in express terms, take effect, until her funeral expenses are defrayed, and her just debts are paid. Until they are paid, the remaindermen could not compel the surrender of the property to them.

It cannot be insisted that the children, who take the residue under the second clause of the will, could not have compelled its payment and delivery to them, after the lapse of eighteen months from the grant of letters testamentary, though the widow was in life; nor that there would have been any right in the executor to have required from them bonds to refund, for the payment, at the death of the widow, of her debts, &c. It is too plain for doubt or controversy, that the funeral expenses and debts of the widow are chargeable only on the property in which she had a life-estate. They are not debts of the testator, with which the appellant can be charged in his representative capacity. If any part of the property in which the widow had a life-estate was in his possession as executor, he would be, with the remaindermen, subject to a suit to enforce a charge against it for the payment of the debts. But there was none in his possession. He had assented to the devise and legacy to the widow, delivering the property to her; thereby assenting, not only to



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the gift of the life-estate to the widow, but to the gift to the remaindermen; divesting himself of all title, and clothing the life-tenant and remaindermen with the entire estate, legal and equitable.—*Hunter v. Green*, 22 Ala. 3:6; *Nixon v. Robbins*, 24 Ala. 663; *Gibson v. Land*, 27 Ala. 117.

It is not of any importance that, on the death of the widow, the property was delivered to the appellant. His title and duty as executor was not thereby restored. He was, at the election of the remaindermen, their bailee; and, when he surrendered it to them, he was acquitted from all liability. Nor is it material, that the appellant may, as executor, have paid debts of the widow owing to other persons. Such payments were made in his own wrong, under a misconception of his authority and duty; have in them no element of estoppel, and afford no reason for compelling him to further wrong.

4. There is still another ground, fatal to the appellee's right of recovery. The property, charged with the payment of the debts of the widow, on her death passed into his possession, as her executor. His right to retain for his own debt, from that property, stands upon the same ground as his right to retain from the personal assets of his testatrix. Without payment of the debt, the remaindermen could not have compelled him to surrender. Voluntarily he surrenders the property to a bailee of the remaindermen; for in no other light could the appellant be regarded. An executor or administrator, with full knowledge of outstanding debts, volunteering to pay legacies, or make distribution, can not, if the assets prove deficient, compel the legatee or distributee to refund.—2 Redf Wills, 556; 2 Lomax on Ex'rs, 297; *Alexander v. Fisher*, 18 Ala. 374. The rule is not inflexible; but there must be some fact or circumstance, relieving the executor or administrator from the presumption of negligence, and evincing good faith on his part, or it can not be departed from. The rule applies to the present case; it was the fault of the appellee that he did not retain for his debt—he had the assets chargeable with it, and voluntarily surrendered them. If he sustains loss, it is his own neglect which inflicts it, as it is the want of prudence of the man who, with full knowledge of all the facts, pays money for which he is not liable.

The decree of the chancellor must be reversed, and a decree here rendered dismissing the bill, at the costs of the appellee in this court, and in the Court of Chancery.

[Marlowe and Wife v. Benagh.]

## Marlowe & Wife v. Benagh.

*Bill in Equity to establish, reform, and foreclose Mortgage.*

1. *Conclusiveness of decree in chancery, affirmed on appeal.*—A decree in a chancery cause, rendered on final hearing on pleadings and proof, as to the relative priority of two mortgages, having been affirmed by this court on appeal, the question of priority is definitely settled in the cause, and can not be re-opened, by petition filed in the court below by one of the parties, on grounds not presented on the former hearing.

2. *Homestead exemption; claim to proceeds of sale of, as between two mortgagees.*—Under a bill in equity to settle the relative priority of two mortgages, and to have them foreclosed by a sale of the mortgaged property, which was the town residence of the mortgagor, and brought \$7,000 at the register's sale; the second mortgagee can not claim \$2,000 of the proceeds, on the ground that his mortgage, which was signed by the mortgagor and his wife jointly, was a valid alienation of the homestead, and the first was not.

APPEAL from the Chancery Court of Tuskaloosa.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 29th January, 1873, by Mrs. Mary C. Benagh, against William A. Battle and wife, N. P. Marlowe and wife, and A. B. McEachin; and sought to establish a mortgage executed to the complainant by said W. A. Battle, to correct a mistake in the description of the property conveyed by it, to settle the equities between the complainant's said mortgage and another mortgage on the same property in favor of Mrs. Marlowe, to have the complainant's mortgage declared a first lien on the property, and to have the property sold in satisfaction of the mortgage debts. The mortgage which the bill sought to establish was given to secure the payment of a promissory note for \$4,860, borrowed money, of even date with the mortgage, January 4th, 1870, and payable twelve months after date, conveyed several town lots in Tuskaloosa, on which was situated the residence of said W. A. Battle, the mortgagor, and was signed by him alone. Mrs. Marlowe's mortgage, which conveyed the same property, was dated the 4th January, 1871, was given to secure the payment of \$5,967.50, borrowed money, and was signed and acknowledged by said Battle and wife. The complainant's said mortgage was in fact delivered up and cancelled, on the renewal of the debt, and another mortgage taken in lieu of it, on the 5th January, 1871, on the same property, and on a tract of land known as the "Perkins plantation." This was done by her attorneys; and the material question in the case, as shown by the pleadings

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and evidence, was, whether it was done with the knowledge and approval of the complainant. This tract of land had been bought by said Battle from the administrators of the estate of C. H. Perkins, deceased, but only about \$3,000 or \$4,000 of the purchase-money had been paid, leaving an unpaid balance of \$8,000 to \$9,000. This tract of land was afterwards sold, and bought by one McLester, at the price of \$12,000; but no part of the purchase-money was received by the complainant on her debt, she having entered on the records a release of the lands from any claim under her mortgage; and the validity and effect of this release, and the circumstances attending the execution of it, were controverted questions in the case. On the 28th February, 1872, William A. Battle and wife executed another mortgage to the complainant, as additional security for her debt, conveying another tract of land of one hundred and sixty acres, ten or twelve mules, and other personal property; and also delivered to her, as a partial payment, or as security, the acceptance of Alfred Battle for \$3,000; and it was insisted on the part of the defendants, Marlowe and wife, that this accepted draft was given and received in consideration of the complainant's release of the Perkins lands from her mortgage. Marlowe and wife answered the bill; insisting on the priority of Mrs. Marlowe's mortgage, and alleging that, at the time her money was loaned, it was on the express understanding and agreement that she was to have a first mortgage on the residence of said Battle, and that the complainant had full knowledge of all the facts, and approved and ratified every thing that her attorneys had done.

On final hearing, on pleadings and proof, at the August term, 1873, the chancellor (Hon. A. W. DILLARD) rendered a decree for the complainant, holding that her mortgage of January 4, 1870, had never been cancelled or released, but was still a valid and subsisting lien on the property conveyed, "and prior in point of time and equity to all other liens mentioned in the pleadings." He therefore directed a sale of the property by the register, and also ordered him to institute an action at law on the accepted draft for \$3,000, and to bring the money, when collected, into court; and ordered a reference as to the question of usury in either or both of the mortgage debts. A sale of the town residence was made under this decree, Mrs. Marlowe becoming the purchaser, at the price of \$7,000; and the register's report of the sale was confirmed by the court. On appeal to this court, by Marlowe and wife, the chancellor's decree was affirmed on the 15th February, 1875.—See the report of the case, 52 Ala. 112. On the 5th November, 1875, Marlowe and



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wife filed their petition in the court below, in which, after stating the proceedings had in the cause, and the affirmance of the chancellor's decree by this court, "but without settling or directing the manner in which said funds shall be distributed between the several mortgagees," and that the moneys had all been collected and paid into court,—they prayed an order or decree, "directing the register to distribute said funds now in court as follows: that the sum of \$5,000, together with the sum of \$161.40, back taxes on said house and lots paid by them, of said proceeds of sale, be paid over to your petitioners by said register, and the balance of said proceeds, less said back taxes, be paid to said Mary C. Benagh." The petition stated, as grounds for the relief prayed, that Mrs. Benagh accepted the \$3,000 draft, on which a judgment had been obtained against Alfred Battle, as a partial payment of her debt, and in consideration of it released her mortgage on the "Perkins plantation;" and that her mortgage, not being executed by said W. A. Battle jointly with his wife, did not convey his homestead exemption in the mortgaged lands, while Mrs. Marlowe's mortgage was a valid alienation of the homestead. The chancellor sustained a demurrer to the petition, and dismissed it; and also overruled and refused a motion, then submitted by said Marlowe and wife, asking that they be allowed to file a cross-bill as to these matters. The decree on the petition, and the refusal to allow a cross-bill to be filed, are now assigned as error.

VAN HOOSE & POWELL, for appellants.—On the first hearing in this case, the chancellor reinstated the complainant's mortgage, declared its priority over that of Mrs. Marlowe, and ordered the funds to be brought into court for distribution; and this court only affirmed the chancellor's decree on these points. The assignments of error on that appeal, and the printed argument submitted for the appellants, embraced the two questions now presented by the petition; and an application for a rehearing was then filed, asking the court to decide these questions. Under these circumstances, the questions not having been determined, the defendants were entitled to present them by petition.—1 Barbour's Ch. Pr. 578; *Cowles & Ledyard v. Andrews*, 39 Ala. 129; Rule of Chancery Practice, No. 102. The original bill brought in the contesting mortgagees, and asked to have the equities settled, and the assets marshalled; and no cross-bill was necessary.—*Tuinton & Brook v. McIntosh*, 46 Ala. 619. If a cross-bill was necessary, the refusal to allow it was error. Story's Eq. Pl. § 396. That the complainant was chargeable

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with the \$3,000 draft, in consideration of which she released her mortgage on the Perkins lands, can not be doubted.—1 Story's Equity, §§ 502, 635-38; 1 Hilliard on Mortgages, pp. 343-4, §§ 30, 31, p. 367, §§ 35, 88, 93. As an alienation of the homestead, the complainant's mortgage was void, because the mortgagor's wife did not join with him in executing it; while Mrs. Marlowe's mortgage, being executed and acknowledged by husband and wife jointly, was a valid alienation of the homestead. Under the decree, the property was sold under both mortgages, and the purchaser acquired a good title to the homestead. To the extent of \$2,000, the value of the homestead, the complainant can assert no claim to the proceeds of sale.

HARGROVE & LEWIS, *contra*.—The points which the petition seeks to re-open, have been already adjudicated, and are concluded by the former decree in this case. As to the release of the Perkins lands, if there were any merit in the ground taken by the petition, it ought to have been presented by cross-bill at the proper time.—*Cullum v. Erwin*, 4 Ala. 452; Revised Code, § 3367. But the release amounted to nothing, since the mortgage on the Perkins lands was worth nothing.—6 Paige, 35; 2 Barbour's Ch. 151; 30 N. Y. 428. The acceptance of Alfred Battle was taken only as additional security, and it has never been collected; if collected, it will be paid into court. The claim advanced on account of the homestead exemption is settled by the decision of this court, at its last term, in the case of *Miller v. Marx*.

STONE, J.—The bill in the present case was filed to establish and foreclose a mortgage, alleged to have been made by Battle, January 4th, 1870, to secure a debt to Mrs. Benagh, therein described. Marlowe and wife, charged to be mortgagees of the same property, were properly and necessarily made parties. A debt to Mrs. Benagh was a fundamental fact, to uphold the mortgage, and the bill for its foreclosure. The existence, description, and amount of that debt were averred in the bill. Marlowe and wife controverted complainant's right to recover, and to a first lien—not on the ground that the alleged debt was not justly owing and unpaid; nor on the ground that Battle had a homestead in the premises, which was not conveyed by the mortgage to Mrs. Benagh, but was conveyed by the mortgage to Mrs. Marlowe.—*McGuire v. Van Pelt*, December term, 1876. The defense was vested on the ground, that the mortgage to Mrs. Benagh, of January 4th, 1870, was cancelled, a mortgage made to Mrs. Marlowe, bearing date January 4th, 1871, and

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a second mortgage—all on the same property—made to Mrs. Benagh, bearing date January 5th, 1871. The real subject of contestation was, whether the first mortgage, that of January 4th, 1870, had been cancelled by authority of Mrs. Benagh. On this central controversy much testimony was taken, and it bears evidence of very deep, if not acrimonious feeling. The chancellor decreed in favor of complainant, settling every question in the cause, except the question of a small amount of usury, and the amount due complainant on her note. That decree was final; and after its rendition, an appeal was prosecuted to this court, and the chancellor's decree in all things affirmed.—See *Marlowe v. Benagh*, 52 Ala. 112. All questions theretofore decided by the Chancery Court, and affirmed by this court, were thereby placed beyond the power of the chancellor to review; and even beyond the power of this court to reconsider, coming before us as the present questions do. The case was not remanded on the former hearing, but remained open in the court below, simply for the purpose of ascertaining the several amounts due, and of executing the decree.

We agree fully with the chancellor, in holding that, in the state in which the case then stood, the petition filed could not be entertained. Its object was to retry the cause on the merits, and on grounds which, if they exist at all, ought to have been pleaded and tried on the first hearing on the merits. It would be subversive of fundamental rules, to allow a defendant to experiment with one defense on the merits, through all the stages of pleading, evidence, and final decree—yea, of affirmance in this court; and, failing in that, to permit such party, by petition, to introduce and have a second trial, on another defense, equally meritorious with the first, which, if true, existed and was known before the bill was filed. Such is not the office of a petition.—See 2 Dan. Ch. Practice, § 1603; *Cowles v. Andrews*, 39 Ala. 125.

We do not wish to be understood as affirming that the defense, if made in the first instance, would have availed any thing. There was nothing in the claim of homestead.—See *Miller v. Marx*, and *Watts v. Burnett*, at December term, 1876. And the proof tends to show that no injury was done Mrs. Marlowe by the release of the mortgage on the Perkins place.

We have noticed all the questions that are before us, and we find no error in the decree of the chancellor on the petition.

Affirmed.



[Coleman et al. v. Ormond.]

**Coleman et al. v. Ormond.***Action on Official Bond of Register in Chancery.*

1. *Official bond of register in chancery; liability of sureties for moneys collected by him as custodian, or special receiver.*—Under our practice and laws, the duties which, in England, pertained to masters and registrars in chancery, are blended, and devolved on the register, and he is the proper person to be appointed the custodian, or special receiver, of a fund or choses in action in court; and for moneys received by him in that capacity, and not accounted for, the sureties on his official bond as register are responsible.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. LUTHER R. SMITH.

The facts of this case were thus stated in the opinion of the court, as delivered by BRICKELL, C. J.:—

“William F. Pierce, having been appointed register of the Chancery Court of Greene county, on the 22d day of July, 1872, executed a bond, payable and with condition as required by law, for the faithful performance of his duties as such register, in which the appellants and others joined as his sureties. Prior to, and at the time of his appointment, there was pending in said court a cause, entitled, according to the transcripts found in this record, *Mary G. Pickens v. H. L. Goodrum*,’ in which was involved a trust fund that had come into the custody of the court. The predecessor in office of said Pierce had been appointed custodian of this fund, and charged with the duty of collecting a debt due to it; the chancellor, in the order of appointment, styling him the register of the court, and directing him to act as ‘*special receiver*’ in the cause. At the time of Steele’s resignation as register, he had instituted a suit at law for the collection of the debt aforesaid, which was pending in the Circuit Court of Tuscaloosa county. On the 28th November, 1872, in term time, in the cause aforesaid, the chancellor ordered that Pierce, ‘*as register, be appointed special receiver* by virtue of his said office, with full power and authority to demand, sue for, and collect all or any part of said trust fund, by suit or otherwise, as may become necessary; and that Steele, as former receiver, *report and account to and with said Pierce, for all moneys or effects which may have come to his hands belonging to said trust fund.*’ At the succeeding term of the court, Pierce, as register and receiver, reported to the court that he had received a net amount of four hundred and thirty dol-

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lars, on the judgment in the aforesaid suit; and he was ordered to loan the same, on good security by mortgage, if practicable, within thirty days, and if not, to deposit the same in the National Bank of Gainesville. Soon thereafter, Pierce died, not having loaned or deposited the money; and this suit was instituted for its recovery, against the appellants, as sureties on his official bond. The defendants requested the court to instruct the jury, that if Pierce was appointed receiver, and in that capacity received and held the money, they, as sureties on his official bond, were not responsible for it. This instruction was refused, and an exception taken. There are demurrers to the complaint, and to a special plea filed by the defendants, and exceptions to the admission of evidence, involving the same question involved in the instruction refused."

THOMAS W. COLEMAN, and E. MORGAN, for appellants.—Sureties have a right to stand on the terms of their contract, and it can not be changed without their knowledge and consent; nor are they responsible for any default of their principal, in respect of matters without the scope of his legitimate duties.—29 Ala. 165. Here, the sureties contracted for the faithful discharge by their principal of "the duties of the office of register as required by law." The register is a recognized officer of the court, and his duties are defined by law.—Rev. Code, § 725. A receiver is a special officer of the court, and subject to its orders.—25 Ala. 104. He is an extraordinary officer, appointed in a particular case, and his duties, rights, and liabilities grow out of the order appointing him, or subsequent orders of the court.—2 Dan. Ch. Pr. 1736. If the court may appoint its own register as receiver, and thereby impose additional duties on him, it can not make his sureties as register responsible for his faithful discharge of these additional duties. To allow this to be done, would add to the condition of the bond another stipulation—that the register shall also faithfully discharge the duties of receiver, in all cases in which he may be appointed by the court, as those duties may be defined by the order appointing him, or modified by any subsequent order or decree in the particular case. But for the statute defining the legal effect of official bonds (Rev. Code, § 169), which is a part of the bond itself, the legislature could not impose new duties on the officer, and bind his sureties for their faithful performance. The authorities are against the power of the court to impose the duties of a receiver on the register.—High on Receivers, p. 56, § 71; *Waters v. Carroll*, 9 Yerger, 102; *Hammer v. Kaufman*, 39 Illinois, 87.

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W. & J. WEBB, *contra*. (No brief on file.)

BRICKELL, C. J. (After stating the facts.)—The question presented, decisive of the cause, is, whether the Court of Chancery could properly commit to Pierce, as register, the duty of collecting and receiving money, on choses in action, which were under its control, and whether a liability for his fidelity in this respect falls within the obligation and condition of his official bond. We lay no stress on the fact that, in the order charging him with the duty, he is styled as special receiver. As register, he is charged with the duty, and it is from the nature and character of the duty, and not from this designation, that we must determine whether he is subjected to liability in his official capacity.

It is the general principle of the common law, that a public officer, and the sureties on his official bond, are responsible for his acts done by virtue, or under color, or by means of the office he holds.—Burge on Suretyship, 49. The principle is declared, and extended by our statute beyond nonfeasance, or misfeasance, to malfeasance under color of office. Code of 1876, § 179; *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183; *Kelly v. Moore*, 51 Ala. 364. But, for acts not within the line of official duty and authority, not under color of office, he may incur personal, not official responsibility; and in that personal responsibility, the sureties on his official bond are not involved.—Addison on Con. § 1117; 1 Chit. Con. 762. The principle at common law was, also, that when the suretyship related to a particular office, it extended only to such things as were included in the office when the bond or engagement was entered into; and the surety could not be made answerable for additional duties subsequently imposed.—1 Chit. Con. 765; *Morrow v. Wood*, at the last term. Sureties, like all other parties, have the right to stand upon the contracts they make; and there can be no change, no enlargement of their liability, without their consent. This rule of the common law is now changed; or, rather, the condition and obligation of official bonds have been enlarged, so as to embrace not only performance of the duties required by law when the bond is executed, but such as may be required by a law subsequently enacted. It is, however, only by a subsequent law, and not by the act of individuals, or the judgment or decree of any court, that additional duties may be imposed, or existing duties enlarged, involving in liability the sureties on his official bond.

In our system of chancery practice, the duties of a registrar, and of a master in chancery, as they were known in the practice of the English Court of Chancery, are blended, and



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devolved on the register.—Code of 1876, § 634. There are duties devolving on him, not expressly defined and declared by statute, or by the rules of practice which have been prescribed by this court; but by the practice of the court from its earliest organization, which has prevailed so long, and has been so uniformly acted on, that it has become the law of the court. Of these duties is that of receiving and holding funds which are brought into court, until the court shall order their disposition. Whether money is paid into court as a tender, or otherwise, in the first instance, it is a necessity that it should be intrusted to the register. There is no other officer so completely under the control of the court, and none within the scope of whose authority it would lie to receive it.

A receiver is defined as an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it. He is an officer of the court, and the property or funds in his possession are regarded as in the custody of the court.—High on Receivers, § 1. His functions and duties are entirely distinct from those of a master, or registrar in chancery, in the practice of the English courts, and from the ordinary duties and functions of the register in our system of practice. The rule in England was, that a master in chancery could not be a receiver. There are many reasons rendering the two offices incompatible here, though sometimes the register has been charged with duties ordinarily appertaining to a receiver. The fund paid into court may be small, and placing it in the custody of a receiver would involve its diminution in costs. There would often be much difficulty in procuring a suitable person, for the small compensation it would yield, to take charge of it, and give a bond as receiver. In such cases, there being no serious incompatibility in duty, the register, who is to act under the eye of the parties in interest, and under the immediate supervision of the court, and who has already given bond for his fidelity, has been required to perform the duties which ordinarily devolve on a receiver—the holding of the funds, or, if deemed advisable, loaning them, until the court shall decree to whom they must be paid. It was in view of this practice, the order appointing Pierce, and denominating him special receiver, by virtue of his office as register, was made.

There was not, as is argued, a new office created by the order of the court, and attached to the office of register, nor were the functions and duties of register and receiver blended. The funds were in court, in the custody of the predecessor

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in office of Pierce, in obedience to the well-established practice, who was charged with the duty of reducing the choses in action into money. These duties devolved on Pierce, *eo instanti* his appointment. The statute gave him a summary remedy to compel his predecessor to deliver to him the funds, whether of money or choses in action, if on demand he refused so to do.—Code of 1876, §§ 206-213.

The sureties on an official bond of an officer of court are answerable for the performance, not only of the duties which the statutes may expressly declare he must perform, but also such duties as by the long and established practice of the court he has been required to perform. There is no statute expressly declaring that a register may receive money in satisfaction of a decree rendered by the court; yet, it is the practice for him to receive it, and authority to receive may be implied from the requisition on him to give notice of its collection. So, it is contemplated that he will receive money paid into court, and a summary remedy is given against him and his sureties for its recovery, if he fails to pay it over.—Code of 1876, § 3378. The only duty Pierce ever performed under the order of court, was that of receiving money, which of necessity had to be paid into court; a duty peculiarly appertaining to the office of register, and not to a receiver. In the character of receiver, so far as that character could in any event be regarded as devolved on him, he performed no duty; and for the money he received we have no doubt of the liability of the sureties on his bond as register.

It is not necessary to examine separately the several rulings of the Circuit Court, for we are satisfied that there is nothing in them prejudicial to the appellants. Affirmed.

## Jones v. Wilson.

### *Bill in Equity to establish and enforce Trust in Lands.*

1. *Deed of gift to married woman, for benefit of family; what interest children and husband take.*—A deed which recites that, “by the bounty and sympathy of the people, exhibited towards Mary W. and her family, owing to losses by fire sustained by her husband, who thereby became insolvent to a large amount, the party of the first part hath received amounts subscribed by the said people, to be applied for the benefit of said family, to secure to them a support;” that these amounts “have been invested by him in the property hereinafter described, whereon is a confectioner’s shop,” and that the deed is “made in pursuance of the objects of said donation;” and which conveys by quit-claim, to the said Mary W., “party of the second part, her heirs and assigns forever,” the property described, “with all the furniture and stock in

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trade pertaining to said store, or confectioner's shop, all the debts due to the same, and the balance due on said subscription lists"; with a stipulation that "nothing herein contained shall be construed against the rights of any person or persons against this property, for supplies furnished in trade, or labor done, or articles supplied for building or carrying on the trade, contracted for by her said husband as agent of the party of the second part,"—does not fasten any trust on the property, such as a court of equity can enforce in favor of the children as beneficiaries, but vests the absolute title in the wife, contemplating that she shall support the family by carrying on the business, and giving her large powers to charge and dispose of the property; nor does it exclude the husband's statutory rights, if he should survive his wife.

2. *Husband's interest in wife's lands.*—On the death of the wife intestate, having a statutory separate estate, the husband is entitled to the use of the realty during his life (Code of 1876, § 2714).

### APPEAL from the Chancery Court of Sumter.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 21st August, 1874, by Alexander S. Wilson and others, children of Mary A. and George Wilson, against William A. C. Jones, said George Wilson, Samuel Brown, and Adolphe Brown; and sought to establish and enforce a trust in a certain house and lot, which said W. A. C. Jones claimed as his own, and which was in the possession of said Samuel and Adolphe Brown as his tenants, and to make said defendants account for the rents and profits. The complainants asserted title to the said house and lot under a deed from Thomas B. Wetmore, a copy of which was made an exhibit to their bill, and which was in these words:

"This indenture, made between Thomas B. Wetmore, of the first part, and Mary A. Wilson of the second part, witnesseth, that whereas, by the bounty and sympathy of the people exhibited towards the said Mary and her family, owing to loss by fire suffered by George Wilson, her husband, who became thereby insolvent to a large amount, the party of the first part hath received amounts, subscribed by said people, to be applied for the benefit of said family, to secure to them a support; and whereas said amounts have been invested in the property hereinafter described, besides in a dwelling-house and lot purchased from James Cobbs; and whereas these presents are made in pursuance of the objects of said donation: now therefore, in consideration of the premises, the party of the first part conveys and quit-claims to the party of the second part, her heirs and assigns forever, the east half of lot number one in the town of Livingston, whereon is now a confectioner's shop, being the same property situated in said town and county bought by the party of the first part from P. G. Nash, trustee, for the purpose aforesaid, as shown by deed recorded in said county in book O, page 673, except the part adjoining said half lot, which was sold subsequently to H. H. Harris by the party



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of the first part; also, all the furniture and stock in trade pertaining to said store, or confectioner's shop; also, all the debts due the same, and the balance due on said subscription lists, a schedule of which is hereto appended as a part of this deed; to have and to hold, subject to the balance due the party of the first part, \$192.95, being excess of amounts advanced by him over and above the receipts, as will appear by reference to a complete statment in account hereunto appended, and which is made a part of this deed. It is understood that nothing herein contained shall be construed against the rights of any person or persons against this property, for supplies furnished in trade, *or labor done, or articles supplied for building or carrying on the trade,\** contracted for by the said George Wilson, as agent of the party of the second part. It is understood, also, that Dainwood, Sanders & Nichols have been paid the balance due for building the last house, by said Wilson, agent, out of the proceeds of the property in trade, and in part by their own liberal subscription. The lumber to build the last house was furnished by Mr. William Jamison,—a liberal and generous subscription. It is understood, also, that the party of the first part shall be held harmless by the property hereby conveyed against all demands whatever, either against him or the property, arising out of its acquisition or management; and this conveyance, which is only a quit-claim, is made subject to this provision. In testimony whereof, the parties of the first and second part hereunto set their hands and seals, June 8, 1859."

This deed was signed by both the parties, and was acknowledged by both of them before a justice of the peace. Mrs. Mary Wilson died on the 21st November, 1864. The defendant Jones, in his answer, alleged that Mrs. Mary A. Wilson, in carrying on the business of the confectioner's shop, as contemplated under the provisions of said deed from Wetmore, became largely indebted to Parker, Lake & Co., merchants in Mobile, and, to secure this indebtedness, she and her said husband conveyed the property, by deed dated the 3d April, 1861, to James Cobbs as trustee, authorizing him to sell the property, if default should be made in the payment of this indebtedness, on or before the 1st April, 1862, and apply the proceeds of sale to the payment of said debt; that said Cobbs resigned, and another trustee was duly appointed in his place, who, on the 26th August, 1866, sold the property under the provisions of the deed; that said Parker, Lake & Co. became the purchasers at the

\*The italicized words are in the deed contained in the first transcript, but not in the transcript sent up on *certiorari*.—*Rep.*

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trustee's sale, and afterwards became bankrupt; and that respondent purchased the property at the sale by their assignee in bankruptcy, and received a conveyance from him. He insisted on the validity of all these conveyances, and copies of them were made exhibits to his answer; and he demurred to the bill for want of equity, and because the complainants had an adequate remedy at law. It is not necessary to state the evidence, under the view taken of the case by this court.

On final hearing, on pleadings and proof, the chancellor overruled the demurrer, and held that the deed of trust for the benefit of Parker, Lake & Co. was null and void, because procured by fraud and duress, and the sale made under it was also void. He therefore rendered a decree for the complainants, and ordered an account of the rents and profits of the property. The overruling of the demurrer to the bill, and the final decree, are now assigned as error.

R. H. SMITH, THOS. COBBS, and THOS. B. WETMORE, for appellants.—If the deed from Wetmore created a statutory separate estate in Mrs. Wilson, then no right of action exists in favor of her children, until after the death of George Wilson, her husband, who is made a defendant to the bill.—Rev. Code, § 2379; *Marshall v. Crow*, 29 Ala. 280. But the deed, properly construed, creates in Mrs. Wilson an equitable separate estate, which she had the power to charge, encumber, mortgage, or alienate at will.—*Short v. Battle*, 52 Ala. 156; *McMillan v. Peacock*, at this term. The deed of trust on the property was executed by the husband and wife, in conformity with statutory requisitions; and while the proof shows persuasion and solicitation to induce the wife to sign it, it utterly fails to show duress, legal coercion, or false and fraudulent representations.—*Miller v. Marx*, and *Coleman v. Smith*, at the last term; *Graham v. Anderson*, 42 Illinois, 514.

SNEDECOR & COCKRELL, *contra*.—The complainants do not file their bill as remainder-men, but as purchasers and beneficiaries under the deed from Wetmore. They claim that the property is charged with an express trust in their favor, which could not be defeated by any act of said Mary Wilson, or of her and her husband jointly; and of which the defendant Jones had notice, actual and constructive, when he purchased the property. They insist that the property was purchased and conveyed for the benefit of the *family* of said Mary and George Wilson, and was placed beyond the power of alienation by them. In their view of the case, it is

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immaterial whether the interest of Mrs Wilson, under the deed, was an equitable or statutory separate estate; and equally immaterial whether the deed of trust was procured by fraud, coercion, or other improper influence, or not. Liens existing on the property while the title was in Wetmore, are expressly preserved by his deed to Mrs. Wilson; but these provisions can not be construed to authorize the creation of future liens or charges by her or her husband, and such a construction would defeat the very objects of the donation.

STONE, J.—A proper construction of the deed from Thomas B. Wetmore, conveying the property in controversy to Mary A. Wilson, will determine most, if not all the questions presented by this record. The deed describes Thomas B. Wetmore as the party of the first part, and Mrs. Wilson as party of the second part, and recites that, “by the bounty and sympathy of the people exhibited towards the said Mary and her family, owing to loss by fire suffered by George Wilson, her husband, who became thereby insolvent to a large amount, the party of the first part had received amounts subscribed by the people to be applied for the benefit of said family, to secure to them a support”; and after reciting that the moneys thus received had been invested in the property afterwards conveyed, and that such conveyance was made “in pursuance of the object of said donation,” then proceeded as follows: “Now, therefore, in consideration of the premises, the party of the first part conveys and quit-claims to the party of the second part, her heirs and assigns forever, the east half of lot No. 1, in the town of Livingston, whereon is now a confectioner’s store; . . . also, all the furniture, and stock in trade pertaining to said store, or confectioner’s shop; also, all the debts due the same, and the balance due on said subscription list, . . . subject to the balance due the party of the first part, of one hundred and ninety-two 95-100 dollars, being excess of amounts advanced by him over and above the receipts. . . . It is understood that nothing herein contained shall be construed against the rights of any person or persons, against this property, for supplies furnished in trade, or labor done, or articles supplied in building, or carrying on the trade, contracted for by George Wilson, as agent of the party of the second part.”

The foregoing are all the clauses of the deed, material to the present inquiry.

There are many nice distinctions drawn in the books, as to the meaning of the word family; and the general result is, that its construction depends mainly on the context, the



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nature of the property, and the use to which it is to be applied.—See 1 Perry on Trusts, § 117 ; 2 Jar. on Wills, 25 *et seq.* We consider it unnecessary in this case to collate the authorities, or to enter into their discussion. The present deed, in the same clauses, conveys real and personal property ; and whatever rights and interests are conferred in one species of property, are conferred in every species mentioned in the conveyance.—*Alford v. Alford*, at December term, 1876 ; 2 Jarman on Wills, 29.

The present deed not only conveys a store, or shop, but also its contents of furniture and stock in trade, and dues to the establishment, and unpaid subscription dues ; and, also, manifestly contemplates that the trade and business be kept up, by selling the goods, replacing the stock, and selling again. And it places all the property in the name of Mrs. Mary A. Wilson, and provides that all the property conveyed—real and personal—shall be liable for articles furnished in trade, &c., “contracted for by George Wilson, as agent” of Mrs. Wilson. Under these very explicit and large powers, it is clear that the *corpus* of the personal property was expected to be disposed of, and that the real property might be charged and incumbered, and, not improbably, disposed of, in the prosecution of the business.

We do not think there is shown, in the frame of this deed, any intention to fasten a trust on the property, such as a court can enforce. On the contrary, we hold, as the deed expresses, that its purpose was to vest the title in Mrs. Wilson, her heirs, and assigns, with certain express powers to charge it, not usual in regard to property owned by married women ; and that any bounty intended for the family, expended itself in putting Mrs. Wilson in a business, which, it was hoped, would enable her to maintain them properly. It follows from this, that any interest the present complainants can assert to this property, must be as heirs of Mrs. Wilson ; not as beneficiaries and purchasers under the deed.

2. The bill in the present case shows that George Wilson, the husband, was in life when it was filed ; and for aught that we can know, he is still in life. There is nothing in the deed to exclude his marital right of succession, under the statute (Code of 1876, § 2714) which secures to him a life-estate in the realty. He joined his wife in the trust deed under which Jones purchased ; and if any one can show that nothing remained due on the debt secured by said trust deed, the said George Wilson must become the actor in such suit. It therefore becomes unnecessary to inquire whether or not any thing remained due to Parker, Lake & Co., as such inquiry can not affect the result of this case.

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The decree of the chancellor is reversed; and this court, proceeding to render the decree which the Chancery Court should have rendered, doth order and decree, that the complainants' bill be dismissed, at the cost of the adult complainants, except Anna Matilda Rawls, incurred in the court below, and in this court.

## Stimpson v. Malone & Foote.

### *Statutory Proceeding in Probate Court for Partition of Lands.*

1. *Partition; jurisdiction of court; presumption in favor of decree.*—Although the Probate Court, in the matter of the partition of property, real or personal, between joint owners or tenants in common (Code of 1876, §§ 3497-3507), is a court of special and limited jurisdiction; yet, when its jurisdiction is apparent on the face of its proceedings, all reasonable intendment is made in favor of their regularity, as of courts of general jurisdiction.

2. *Same; where parties own unequal interests.*—The fact that the parties own unequal interests in the property, so that partition by lot is impracticable, does not take away the jurisdiction of the court.

3. *Same; objections to commissioners' report.*—Objections to the commissioners' report are not available on error, unless made in the primary court, and reserved by bill of exceptions.

### APPEAL from the Probate Court of Marengo.

In the matter of the petition of Malone & Foote, as partners, asking the partition of certain lands, which were particularly described, and which were alleged to be situated partly in Marengo and partly in Choctaw county, between themselves and Herbert H. Stimpson. The petition was filed on the 10th April, 1876, and was under oath. It alleged that the petitioners were the owners "of an undivided interest of six-twentieths" of two tracts of lands, known respectively as the "Barney Upper Place" and the "Barney Lower Place," which were particularly described by the government numbers and designations, and which together contained more than eight thousand acres; and that the other undivided interest, being fourteen-twentieths, belonged to said Herbert H. Stimpson, who resided in Cambridge, Massachusetts, and who had mortgaged his interest to Sumner J. Brooks and Knowlton S. Chaffee, who resided in Boston, Massachusetts. On the filing of the petition, the court appointed the first Monday in June for the hearing of the application, and ordered notice, by publication, to be given to said Stimpson, Brooks, and Chaffee; and on that day, the petitioners and said Stimpson appearing by attorney, the court granted the application,

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and appointed five commissioners to make the partition as prayed. The commissioners made a report of their proceedings in writing, which, after reciting their appointment, proceeded thus: "After being sworn, as by law directed, to execute said trust, and to make said partition, we have examined the lands described in said commission, and had the same surveyed; and we do hereby divide said lands as follows: We divide and allot to said Malone & Foote that part or portion of the Barney Upper Place beginning at the mouth of Horse Creek, and more particularly described as follows," &c., "all lying and being in Marengo county, and containing altogether 2,164 acres, and being equal to six-twentieths of all the lands described in said commission. And we allot to the said Herbert H. Stimpson and his mortgagees the following lands as their part, to-wit," &c.; "and that the said shares so allotted and divided to the said Stimpson and his mortgagees are equal to fourteen-twentieths of the lands described in said commission. And the undersigned, commissioners as aforesaid, hereby report that the said division, partition and allotment was conducted in all respects, as nearly as may be, with fairness, and without partiality, as directed by the commission, after having regard to the character of the soil and other advantages, so as to make the different shares as equal in value as practicable to the interests owned by the said parties, as set forth in said commission. This done at Linden, in the office of the judge of the Probate Court of said county, this 28th day of August, 1876, after having given the notice, as required by section 3110 of the Revised Code, by publication of the same in the *Marengo News Journal*." This report, as set out in the record, was signed by the commissioners, and attested by the probate judge.

The decree of the court, rendered on said 28th August, 1876, after reciting the appointment of the commissioners and their appearance, continues thus: "And the said commissioners having made and signed a statement in writing, which is attested by the judge of this court, showing the result of the proceeding, which was duly had in the presence of said judge, under and in pursuance of said commission and decree, to determine by lot to whom each of the several parcels, into which said land was laid off in order to make such partition, should belong, and setting forth to whom the said several parcels or lots were allotted, together with all the facts relating to such division and allotment; thereupon came H. H. Stimpson *et al.*, by their attorney, and also came the said Malone & Foote by their attorney; and the said H. H. Stimpson *et al.*, now objecting to the pro-



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ceedings of the said commissioners in this behalf, and to the return thereof, upon the ground that the same are irregular and incomplete; and the said objections being argued by counsel, and heard and duly considered by the court, it is ordered, adjudged, and decreed, that said objections be overruled, and that the said proceedings of said commissioners, and their said return, or report thereof, be in all respects ratified, approved, and confirmed," and that the proceedings be recorded. There is no bill of exceptions in the record.

The following errors are now assigned: "1. The record does not show the jurisdiction of the court over the subject-matter. 2. The commissioners did not pursue or comply with the requirements of the statute in such cases. 3. The court erred in the decree rendered. 4. The court erred in overruling the appellant's objections to the proceedings and report of the commissioners, and in ratifying and confirming the same. 5. The court was without jurisdiction, as shown by the record."

GLOVER & TAYLOR, for appellant.

GEO. G. LYON, *contra*.

BRICKELL, C. J.—It may be admitted that the Court of Probate, in the matter of the partition of property, real or personal, between tenants in common, or joint owners, is a court of limited or statutory jurisdiction, and that it is essential to the regularity of its sentence that its records should disclose every fact on which the jurisdiction depends. Yet, when its jurisdiction is apparent on the face of its proceedings, the rule applies that is applied to courts of general jurisdiction, that all reasonable intendments must be made to support its decrees.—*Wyman v. Campbell*, 6 Port. 219; *Key v. Vaughn*, 15 Ala. 496; *Wilson v. Wilson*, 18 Ala. 176. If through the jurisdiction of the Court of Probate the partition of lands is sought, it must be by an application in writing, made to the judge of probate of the county in which the lands are situate, by the joint owners, or tenants in common thereof, or one or more of them. The application must set forth the names of all the persons interested in the lands, and their residence, and the lands must be described; the interest of each joint owner, or tenant in common, must be stated, and the number of shares into which the lands are to be divided.—R. C. §§ 3105–06. When the application is filed, the jurisdiction of the court attaches. The subsequent proceedings are in the exercise of the jurisdiction; and while the record must disclose a substantial conformity in them

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to the statutes, they are not to be scanned for the purpose of finding errors, but viewed with the liberality which would be extended to the proceedings of courts of general jurisdiction.

The record discloses that an application, in writing, was made to the Court of Probate, averring every fact on which its jurisdiction rests, unless the fact disclosed, that the parties between whom partition was sought owned unequal interests, so that partition by lot was impracticable, prevented the jurisdiction from attaching. The jurisdiction is dependent on the joint ownership, or the tenancy in common, not on the equality of the interest of the owners, or tenants in common. If property is held by them, though in unequal interests, the jurisdiction exists, and the decree must be for a partition or division, *according to their respective interests therein*.—R. C. § 3108. Neither the language of the statute, nor the manifest object of its enactment, justifies the limitation of the jurisdiction to cases in which the tenants in common have equal estates or interests, and there can be partition by lot. The application clothed the Court of Probate with the jurisdiction it exercised.

The remaining grounds of error are of matters touching the regularity of the proceedings of the commissioners appointed to make partition, and the sufficiency of their report. If there be any force in these objections, they were the proper matter of exception to the report in the Court of Probate. No such exceptions were interposed in that court, and we must decline now to consider them.

The decree of partition is affirmed.

MANNING, J., not sitting.

## Hill's Adm'r v. Erwin & Jones.

*Action on Promissory Note for Purchase-Money of Land sold by Administrator under Probate Decree.*

1. *Payment in Confederate currency, or in notes on third person.*—A payment in Confederate currency, during the late war, on a debt payable in good money, can not be scaled at the instance of the creditor, and reduced to its real value at the time; and on the same principle, a payment in notes on third persons, made and received at their face value as a partial payment only, can not be treated, at the will of the debtor, as a payment in full, because the debt was payable in Confederate money, and the notes were worth in gold more than the entire debt in that currency.

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| 60 | 341 |
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2. *Contracts payable in Confederate currency; measure of recovery.*—The principle is now firmly settled (and the court adheres to it as an equitable solution of a troublesome question, though it is difficult to reconcile it with established principles), that the measure of recovery on contracts for the purchase of property, made during the late war, and understood to be payable in Confederate currency, is the value of the property in good money at the time the contract was made.

3. *Same; computation of partial payments.*—In an action on a note given for the purchase of property during the late war, with the understanding that it might be paid in Confederate currency, a partial payment having been made in that currency, the ratio between the nominal amount of the note, with interest to the time of the partial payment, and the unpaid balance; is also the ratio between the actual value of the property at the time of the purchase, with interest, and the balance still due in good money; to which balance, thus ascertained, interest must be added.

APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEORGE H. CRAIG.

This case has been before this court on two former appeals, and may be found reported in 44 Ala. 661–8, and 51 Ala. 580–84; the judgment of the court below being each time reversed, and the cause remanded. The action was brought by Mrs. Susan B. Hill, as the administratrix of her deceased husband, Charles W. Hill, against George Erwin and Allen C. Jones; was commenced on the 9th March, 1866, and was founded on the defendants' promissory note for \$40,286.98, dated the 10th February, 1863, and payable to the plaintiff, as such administratrix, on the 1st March, 1864. The note was given for the purchase-money of a tract of land, sold by the said administratrix, under a decree of the Probate Court of said county, in 1863, and bought by the defendant Erwin. There was an agreement, or understanding, between the parties, at the time of the sale, that the note might be paid in Confederate treasury-notes; and there was a credit indorsed on it, dated June 1st, 1864, of \$32,545.73. After the last remandment of the cause, the administratrix reported the estate insolvent, settled her administration, and resigned; and the cause was afterwards revived in the name of Pascal W. Tutwiler, as administrator *de bonis non*. On the last trial, as the present record shows, the principal question in controversy was, whether the said payment of \$32,345.73 discharged the note entirely, or was a partial payment only. It was shown that the value of the land, at the time of the sale, was about \$13,000 in gold; that the value of gold, as compared with Confederate currency, was three to one at the time of the sale, and about twenty to one when the note fell due, and when the payment was made. The court allowed the defendant, Erwin, to testify, against the objection of the plaintiff, that the payment was made in the notes of solvent third persons, which were worth their face value—"as good as



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gold, or its equivalent;" and to the admission of this evidence an exception was reserved by the plaintiff. The court charged the jury, at the request of the defendants, "that if Erwin, before the commencement of this suit, paid \$32,000 in promissory notes, equal in value to that sum in gold, and if that sum was as much or more than the plaintiff was legally, justly, and equitably entitled to recover, then the defendants are not bound to pay any more, and the jury should find for the defendants." The plaintiff excepted to this charge, and he here assigns it as error, together with the admission of the evidence to which he excepted, and the refusal of several charges asked.

THOS. J. SEAY, for appellant.

W. M. BROOKS, *contra*.

STONE, J.—The receipt given to Erwin, the credit indorsed on the note, and even the testimony of Mr. Erwin, all prove, that the said sum of thirty-two thousand five hundred and forty-five 73-100 dollars was simply a payment. When made, Erwin received a receipt, which he produced on the trial, in the following language: "Received, 1st June, 1864, on the within note, thirty-two thousand five hundred and forty-five 73-100 dollars." (Signed) "SUSAN HILL, by *H. Tinker*." The language of this receipt, and all the circumstances, show conclusively that this was intended as payment, *pro tanto*. Erwin paid it with that understanding, and it was received with that understanding. There is a wide difference between a payment proper, and a cross demand, which is available only as a set-off. The present transaction was payment. It has been uniformly and rightly held in this court, that payments, received in Confederate money, and allowed at their face value, on debts that were payable in good money, can not, at the mere will of the creditor, be scaled and reduced to the real value of the Confederate currency when received. This, because the creditor in the given case consented to receive them in payment as so many dollars.—*Ponder v. Scott*, 44 Ala. 241. See *Riddle v. Hill*, 51 Ala. 224. The credit should have been considered and allowed only as partial payment.

2. It results, from what is said above, that there is a balance of the note sued on, not liquidated by the payment of \$32,545.73. It is settled in this State, too firmly to be now questioned, that on contracts for the purchase of property, shown to have been made with an understanding that they were to be paid in Confederate currency, the measure of

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recovery is the value of the property in good money, at the time of the purchase. It is difficult to reconcile this rule with established legal principles, but we adhere to it as an equitable solution of a very troublesome question.—*Herbert v. Easton*, 43 Ala. 547; *Riddle v. Hill*, 51 Ala. 224, 234; *Erwin & Jones v. Hill*, *Ib.* 580; *Whitfield v. Riddle*, 52 Ala. 467. See, also, *Thorington v. Smyth*, 8 Wall. 1; *Stewart v. Solomon*, U. S. Sup. Court, May, 1877.

3. What is said above leaves a balance of the note unpaid; and the question arises, how is that balance to be ascertained? Obviously by ascertaining, first, the money value of the land sold, at the time of the sale. Second, by ascertaining the unpaid balance of the note, at the time of the partial payment. Then, the proportion which the unpaid balance bears to the whole note, with interest to the payment, will show the proportion of the ascertained value of the land which remains unpaid; to which interest must be added from the agreed maturity of the note.

The rulings of the Circuit Court are in conflict with these views; and its judgment is reversed, and the cause remanded.

## Shaw & Cox v. Lindsey.

*Bill in Equity by Purchaser at Execution Sale, to quiet Title, and enjoin Action at Law.*

1. *Filing demurrer after answer.*—When a demurrer is not incorporated in the answer, as authorized by the statute (Code of 1876, § 3783), it is irregular to file it afterwards without leave of the court, and, if so filed, it may be struck from the files on motion; but, under the liberal statute of amendments (§ 3790), the court would be bound, on application, to allow the demurrer to be incorporated in the answer at any time before final decree; and proceeding to a hearing on the demurrer, without objection, is a waiver of the irregularity.

2. *Levy and sale of equity of redemption under execution; foreclosure of mortgage by sale under power.*—By statute (Code of 1876, § 3209), an execution may be levied on an equity of redemption in mortgaged lands; but, if the mortgage is foreclosed by a sale under the power, after the levy, but before the sale under the execution, the equity of redemption is cut off, and the purchaser at the subsequent execution sale acquires nothing.

3. *Levy and sale of "perfect equity" under execution.*—The only "perfect equity" which, under the said statute, can be levied on and sold under execution, is that of a purchaser who has paid the entire purchase-money; the statute does not apply to the interest of a defendant in execution, whose lands are sold under a power in a mortgage while the execution is in the hands of the sheriff, and bought in for him by a third person, to whom he does not refund the money until after the subsequent sale under the execution.

4. *Sale of lands by assignee in bankruptcy.*—When the title to lands surren-

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dered by a bankrupt is in litigation, and the assignee has not acquired possession, he can not sell them without an order of the court of bankruptcy, made on his petition, after notice to the parties claiming adversely; and a sale by him, without such an order, is a nullity.

5. *When equity will not enjoin ejectment.*—A court of equity will not, in the absence of some special equity, enjoin the prosecution of an action of ejectment; nor will it interfere, where the title asserted by each party is of legal cognizance; as where the plaintiff sues to recover land which he claims as his homestead, and the defendant insists that his right of homestead exemption has been waived and forfeited.

### APPEAL from the Chancery Court of Pickens.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 2d September, 1872, by F. F. Lindsey, against B. F. Shaw, Elihu Cox, and others; and sought to quiet the complainant's title to a certain tract of land, of which he was in possession under claim of title, and to enjoin the prosecution of two actions at law, brought by said Shaw and Cox respectively, each claiming a part of the land. The complainant asserted title to the land under a purchase at sheriff's sale under execution against said Cox, and a subsequent purchase at a sale made by John P. Lang, as the assignee in bankruptcy of said Cox. Cox claimed eighty acres of the land as his homestead exemption, and commenced his action at law to recover it on the 2d September, 1872. Shaw claimed the residue of the tract under a purchase at a sale made by H. S. Shelton, as trustee in a deed of trust executed by said Cox, and commenced his action to recover it on the 4th November, 1871. The deed of Cox to Shelton, as trustee, was dated the 23d August, 1866; was given to secure the payment of several promissory notes, all dated the 16th August, 1866, and falling due on the 1st March, 1867, 1868, and 1869, respectively, amounting in all to about \$5,000; and authorized the trustee to sell, if default should be made in the payment of any of the secured notes at maturity. It was executed by said Cox alone, and duly acknowledged by him. Default having been made in the payment of the notes first falling due, the trustee advertised and sold the lands, according to the provisions of the deed, on the 24th August, 1867; and they were knocked down to A. Latham as the purchaser, to whom they were conveyed by the trustee, and by whom they were afterwards conveyed to said B. F. Shaw, by quit-claim deed dated the 30th March, 1868. The complainant recovered a judgment against said Elihu Cox and others, on the 28th April, 1863; and the records having been destroyed by fire, this judgment was substituted, on motion, on the 29th April, 1867. An execution on this judgment was issued, and went into the hands of the sheriff, on the 25th May, 1867, and was by him levied on said lands; and this execution was in his hands when the



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lands were sold by Shelton under the deed of trust. The lands were sold by the sheriff, under this levy, on the 7th October, 1867, when the plaintiff in the execution became the purchaser, and received the sheriff's deed. On the 16th November, 1867, an *alias* execution was issued on said judgment, and was levied on three hundred and twenty acres of the land, which were not embraced in the former levy and sale; and at the sale under this levy, on the 6th January, 1868, the said plaintiff became the purchaser. On the 10th March, 1868, said Cox was duly declared a bankrupt; and at a sale by his assignee in bankruptcy, made on the 8th January, 1870, the complainant became the purchaser of his interest in the said lands, and received the assignee's deed.

The above are the material facts shown by the bill and its exhibits. The bill alleged that, though Latham was the ostensible purchaser at the sale by Shelton under the deed of trust, the purchase was really made for the benefit of said Cox, through the agency of said Shaw, who was his son-in-law, and the assistance of said Shelton, who was his attorney; and that, by agreement and arrangement between these parties, the transaction was thus consummated: Cox had a growing crop on the land, which was not subject to the levy of the execution, but neither he nor Shaw had any money; while Latham "was a prosperous farmer, ahead of the world, and occasionally had money to lend at a fructifying per cent., when well secured by lien-notes on growing crops;" and he was induced by them to attend the sale, and advance the money (\$467.20) to buy the lands, receiving a conveyance from the trustee, and a written obligation from Cox, in the form of a promissory note for advances to make a crop, which was declared to be a lien on his crop then growing. This obligation, or note, a copy of which was made an exhibit to the bill, was dated the 10th August, 1867, and was recorded on the 8th October, 1867; but the bill alleged that it was in fact executed and delivered on the day of the trustee's sale, August 24, 1867, and was given pursuant to the arrangement above stated; and that Cox gathered, ginned, and packed his crop of cotton, with the permission of Latham, sold it, and sent the money to Latham by the hands of Shaw to pay the note, whereupon Latham executed his quit-claim deed to Shaw, as above stated. The complainant insisted, in his bill, that the execution on his judgment created in his favor a lien on all the lands, which continued up to the date of the sale by the trustee; that the purchase of Latham having been made for the benefit of Cox, as above stated, Latham was only a trustee of the legal title, while Cox had a perfect equity, which was subject to sale under the complainant's

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execution, and which passed to him by his purchase at the execution sale; "and if complainant is mistaken as to his rights acquired under said sheriff's sales as aforesaid, then he avers that said Cox dragged after him, into said bankrupt court, all the equitable and legal title in and to said lands that was still vested in him," and that complainant acquired this interest by his purchase at the sale by the assignee in bankruptcy. The bill alleged, also, that Cox never claimed any exemption in the lands prior to the sheriff's sales; that he yielded the possession to the complainant on his purchase at the execution sale, only reserving the right to gather the growing crop; and that the complainant had continued in peaceable possession up to the filing of his bill. Latham, Shelton, and Lang, the assignee in bankruptcy, were joined as defendants to the bill, with Cox and Shaw. The prayer of the bill was for an injunction of the actions at law; that Shaw and Latham be declared trustees of the legal title for the benefit of the complainant, and be compelled to convey to him; and the general prayer was added, for other and further relief.

Separate answers were filed by Latham, Shelton, and Lang, and a joint answer by Shaw and Cox. Latham alleged that he became the nominal purchaser of the lands at the trustee's sale, at the instance and request of Shaw, to whom he had agreed to advance the money; that he took the sheriff's deed to himself for better security, and the lien-note on the growing crop as additional security; that Shaw afterwards repaid him the money so advanced, with interest, and he then conveyed the lands by quit-claim deed to said Shaw. Shaw and Cox, in their joint answer, alleged that the purchase was made by Shaw for his own benefit; that Cox gave the lien-note on the crop at the request of Shaw, and afterwards loaned the money to Shaw which the latter paid to Latham; and that Shaw, in these transactions, was acting in good faith, for his own benefit, and expected to get a good title to the lands by his purchase. They attacked the validity of the complainant's judgment, on grounds which it is not necessary to notice; denied that he acquired any title by his purchases at the sheriff's sales; insisted that the sale by the assignee in bankruptcy was void, because made without an order of the bankrupt court; and alleged that Cox had always claimed his homestead exemption in the lands, and had given due notice of his claim. "Having now fully answered the said somewhat remarkable bill, and willing to waive its palpable defects of multifariousness and argumentativeness, and submitting to the jurisdiction of the court," they then asked that their answer might be taken as a cross-

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bill, and that the deeds from the sheriff and the assignee in bankruptcy might be cancelled and declared null and void, as a cloud on their title to the lands.

The answers were filed on the 24th September, 1872. On the 16th November, 1872, a demurrer was filed by Shaw and Cox jointly, for want of equity, and for multifariousness; and on the same day a demurrer was filed by Latham and Shelton, jointly and severally, for want of equity, for multifariousness, and because they were improperly joined as parties to the bill. At the January term, 1873, the demurrers were heard, and overruled; and afterwards, on final hearing on pleadings and proof, a decree was rendered for the complainant, in accordance with the prayer of the bill. The overruling of the demurrer, and the final decree of the chancellor, are now assigned as error.

M. L. STANSEL, and H. S. SHELTON, for appellants.—1. The bill presents a clear case of multifariousness, for which it should be dismissed by the court.—*Hardin & Williams v. Swoope*, 47 Ala. 273-78; *Kennedy v. Kennedy*, 2 Ala. 573; *McIntosh v. Alexander*, 16 Ala. 87; Story's Eq. Pl. § 271; 1 Daniell's Ch. Pr. 385, mar.

2. Cox's right to a homestead is clearly shown. The land which he claims was not embraced in the deed to Shelton, and only forty acres of it was sold by the sheriff. His affidavit and claim of exemption were duly made and filed. The assignee could not sell it, if he had attempted to do so.—*Bump on Bankruptcy*, 332; *James on Bankruptcy*, 33, 58.

WATTS & WATTS, *contra*.—1. The objection on account of multifariousness was expressly waived in the answers of Shaw and Cox, and it could not be afterwards raised by demurrer filed without leave of the court.—1 Brickell's Digest, 782, § 134; *Ib.* 753, § 1689; *Betts v. Betts*, 18 Ala. 787; 22 Ala. 115; 45 Ala. 161.

2. The claim of homestead exemption was waived and forfeited, under the authority of *Bell v. Davis*, 42 Ala. 460.

BRICKELL, C. J.—The bill was filed to quiet the title of the appellee, to lands therein described, which he claims to have purchased at sheriff's sale under an execution in his own favor, against the appellant Cox, and at sales made by Lang, the assignee in bankruptcy of Cox, and to enjoin an action of ejectment commenced by the appellant Shaw, for the recovery of a part of the land; and a statutory real action commenced by Cox, for the recovery of a part claimed as a homestead. The bill was answered by Cox and Shaw



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jointly, expressly waiving the objection of multifariousness, and they filed a cross-bill for relief. Subsequently, they interposed a demurrer, assigning as causes, not only multifariousness, but a want of equity in the original bill. The demurrer was overruled, but on what ground is not shown by the record; and no objection to its regularity, or to the time of filing it, appears to have been made. It is now insisted in argument, that the demurrer was irregular, having been filed after answer, without leave of the court, and was properly overruled, without regard to its merits.

1. The rule of practice, in courts of law, which has obtained in this State from an early day, is, that an objection to the time of filing a pleading must be taken by a motion to strike from the files, and, if not taken in that mode, must be deemed waived.—*Holley v. Young*, 27 Ala. 203; *Hart v. Turk*, 15 Ala. 675; *Sadler v. Fisher*, 3 Ala. 200. A similar rule obtains in courts of equity; and if a demurrer was filed with an answer, which, prior to our statute, was irregular, the answer overruling the demurrer, the practice was, not to overrule the demurrer, but on motion to strike it from the files. 1 Dan. Ch. Pr. 592. The statute authorizes the incorporation of a demurrer in an answer; and after answer, without incorporating a demurrer, it is irregular, without leave of the court, to file it separately. The statute of amendments, in equity, is very broad and liberal; and the court would be bound, on application, to permit the demurrer to be incorporated in the answer, at any time before final decree.—Code of 1876, § 3790. Proceeding to a hearing on demurrer, filed subsequent to, and not with the answer, is a waiver of the irregularity. The merits of the demurrer must, therefore, determine the correctness of the decree overruling it.

2. A purchaser of lands, at a sale under execution, acquires the estate, or the interest of the defendant, which the law authorizes to be levied and sold; no other, and no greater estate or interest. The statute subjects to levy and sale an equity of redemption, a perfect equity, the defendant having paid the purchase-money, a legal title, or a vested legal interest in possession, reversion, or remainder, whether it is an entire estate, or held in common with others.—Code of 1876, § 3209. It is apparent that Cox, the defendant in execution, had, at the time the record of the judgment against him was substituted, and at the time of the issue and delivery of execution to the sheriff, merely an equity of redemption in the lands. The deed of trust to Shelton was a conveyance of the entire legal estate, without reservation to Cox of the right to possession until default was made in the

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payment of the secured debt. If he remained in possession after its execution, he was simply the tenant at will of the trustee, and without any legal interest, or a legal right to possession, subject to the lien of an execution against him. The equity of redemption—the right to restore himself to his original estate—was all that remained in him; and this, under the statute, was subject to execution. But, before the sale by the sheriff, Cox having made default in the payment of the debt secured, and the event having happened on which the trustee was empowered to sell the lands in pursuance of the terms of the deed, he made a sale. The sale as effectually divested Cox of all estate and interest in the lands—as effectually cut off the equity of redemption, as would a decree of foreclosure in a court of equity.—2 Wash. Real Prop. 78; 4 Kent, 159; *Childress v. Monette*, 54 Ala. 317. All that remained to him, or to his judgment creditors, after the sale, was the statutory right and privilege of redemption from the purchaser.

3. The bill proceeds in its averments, however, to assert that Cox, notwithstanding the sale by the trustee, had a perfect equity in the lands. The equity is supposed to arise from the facts, as alleged, that the lands, though nominally purchased by Latham, for Shaw, were in fact purchased for Cox, and that the purchase-money was paid by Cox giving a lien on the crops growing on the lands. Passing over all the numerous allegations of fraud, the bill very clearly shows that Latham had not been paid the purchase-money, when the sale and conveyance was made by the sheriff. The payment, it avers, was made subsequent to that sale and conveyance; and it has no retroactive operation, so as to enlarge the interest which the sheriff had authority to sell. The *perfect equity*, which the statute subjects to levy and sale under execution at law, is of one class only—that of a vendee, who has *paid the purchase-money*. There may be other equities of equal dignity, standing on as high ground, and as easily enforced in courts of equity, and yet not subject to levy and sale under execution at law. The subjection of equitable interests, or estates, to sale under legal process, was, prior to the Code, expressly prohibited by statute.—Clay's Digest, 350, § 31. The equity of a vendee, in possession, who had fully paid the purchase-money, though perfect, the bare legal title outstanding in the vendor, which he had covenanted to convey on the event which had happened—the payment of the purchase-money—could not be sold under execution at law, though the legal estate could be, and the purchaser could recover on it against the vendee, compelling him into a court of equity for a specific performance.—*Driver v. Clarke*, 13

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Ala. 192; *Elmore v. Harris*, *Id.* 360; *Nickles v. Haskins*, 15 Ala. 619; *Hogan v. Smith*, 16 Ala. 600. The estate of the vendee, though equitable, in such case, comprehended the entire beneficial interest. Converting it into a legal estate, the vendee could delay, and thereby embarrass and delay his judgment creditors, by compelling them to the more expensive and dilatory proceeding of a bill in equity to subject it. Without subjecting all equities to execution at law, the equity of the vendee who has fully paid the purchase-money, termed in judicial decision, and in other statutes, a *perfect equity*, is subjected. The equity is inchoate, imperfect, until the purchase-money is paid; and that being unpaid when the sale was made by the sheriff, though it may have been subsequently paid, the appellee acquired no interest in the lands.

4. The right and power of an assignee in bankruptcy, to sell and convey the estate of the bankrupt, depends entirely on the statute. A sale and conveyance made by him, in any other mode than that which is prescribed by the bankrupt law, is a mere nullity, conveying no title. Not advertent to any other objections to the title the appellee claims to have derived from the assignee in bankruptcy of Cox, it is shown by the bill that the title to the lands conveyed originally to Shelton was in dispute, being claimed by Latham and Shaw, and by the appellee, and had never passed into the possession of the assignee. An assignee in bankruptcy can not sell property in dispute, except under an order of the court of bankruptcy, made on his petition, after notice to the parties claiming adversely. No such order was obtained, and the sale and conveyance passed no title to the appellee.—Bump on Bank. 9 ed. 569. It results, that the appellee is without title, legal or equitable, to the parts of the land embraced in the action of ejectment commenced by Shaw.

5. A court of equity, unless in a case free from doubt, and of some peculiar equity, will not restrain a plaintiff in ejectment from prosecuting an action at law on the legal title. High on Inj. 182. Nor will the court interfere, when the title of the plaintiff, and of the defendant as claimed, is purely legal, and the ground relied on for relief is available as a defense at law.—*Id.* Without inquiring into the validity of the claim of Cox to a homestead, or whether the claim was asserted at the proper time, and in the proper manner, to preserve and perfect the right of exemption, it is enough to say, if they were not, the defense at law is complete, and being complete, there is no reason for the interference of a court of equity.

The decree of the chancellor must be reversed, and a de-



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cree here rendered, dissolving the injunction, and dismissing the bill; and the appellee must pay the costs of this court, and of the Chancery Court.

## Childs, adm'r &c. v. Jones & Co.

### *Motion for Order of Sale under Execution, and Instructions to Sheriff.*

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60 316  
66 279  
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1. *Lien of execution*.—An execution is a lien on the property of the defendant, from the time it is received by the sheriff, although he may not have indorsed his receipt on it, nor entered it on his docket; and the death of the defendant does not destroy such lien, so long as successive executions are issued without the lapse of an entire term.

2. *Exemption of personalty, in favor of decedent's family*.—The exemption of personal property for the benefit of the family of a deceased debtor, under the provisions of the act of April 23, 1873 (Sess. Acts 1872-3, p. 64), can only be claimed where he left a widow or minor child or children.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

This was a motion by Joel W. Jones & Co., plaintiffs in execution, for a *venditioni exponas* to the sheriff, commanding him to sell certain personal property, on which he had levied an execution in their favor against Green B. Mobley, deceased; and also a motion on the part of the sheriff, for instructions in the matter. The execution was levied on the 28th August, 1877, on certain articles of household and kitchen furniture, particularly described, to which a claim was interposed by W. H. Childs, the administrator of said Mobley's estate, on the ground that they were exempt from levy and sale, for the benefit of the defendant's family. On the trial and hearing of the motions, an issue being formed between the plaintiffs in execution and the administrator, the following facts were proved: The plaintiffs' judgment, on which the execution was issued, was rendered on the 21st October, 1876; and an execution on it was issued on the 4th November, 1876. Joel W. Jones, one of the plaintiffs, died on the 31st October, 1876, and the defendant died on the 12th January, 1877; and the question of fact mainly controverted was, as to what was done with this execution. The deputy-clerk, who principally attended to the business of the clerk's office, testified that he delivered it to the sheriff in person, on the 29th November, 1876, but did not make any entry of its issue on the execution docket; that it was re-

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turned to the clerk's office by W. V. Stewart, one of the sheriff's deputies, who had indorsed on it these words: "Received in office, March 23, 1877," to which was signed the name of the sheriff by said deputy; that no indorsement was then written on it; "that after the return day of the execution, and after the court had convened at the Spring term, 1877, the sheriff obtained the execution from him," and made the following indorsements on it, to which he signed his name and title: "Received in office, November 29, 1877;" "Returned for an *alias*, April 12, 1877." When the execution was offered in evidence, the indorsement made by Stewart appeared to have been erased, but it was not shown by whom the erasure was made. Said Stewart, being examined as a witness by the court of its own motion, testified that he received the execution in Gainesville, on the 23d March, 1877, from one of the plaintiff's attorneys, and made said indorsement on it, and returned it to the clerk's office, and "that the said indorsement had never been erased with his consent." The sheriff was examined as a witness for the plaintiffs, and testified "that said execution came to his hands on the 29th November, 1876, and was by him sent to Gainesville, where said Mobley lived, by the hands of McCormick, one of his deputies," to see one of the plaintiff's attorneys, who lived in Gainesville, for instructions as to the levy; that it was in his hands at the death of said Mobley, and that he did not enter the receipt of the execution on his books until after the death of said Mobley. Said McCormick testified that, to the best of his recollection, the sheriff handed the execution to him, to see plaintiffs' said attorney at Gainesville, "about the last of December, or the first of January;" that it was in his hands at the time of said Mobley's death, and was afterwards handed by him to said attorney. The attorneys for the administrator each testified, that, soon after the death of said Green B. Mobley, being consulted by said W. H. Childs, who was his son-in-law, as to the necessity or propriety of taking out letters of administration on his estate, they went to the clerk's office, to ascertain whether there were any executions against him; that the clerk's docket did not show that any execution had been issued against him; that the deputy-clerk, in charge of the office, informed them that there was only one execution out against Mobley, which he had delivered to one of the plaintiffs' attorneys; and that the sheriff, on whom they called, explaining to him the reasons for their inquiries, informed them that he had no execution against said Mobley, and had never received any. The plaintiffs' said attorney testified, that the execution was put into his hands after the

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death of Mobley, and was by him handed to said Stewart, the sheriff's deputy, by whom it was returned, as above stated. It was proved, also, "that no order of court had been obtained or applied for, authorizing the change in the return on the execution, or authorizing a revivor."

This being, in substance, all the evidence relating to the execution, the court allowed it to go to the jury as evidence, with the several indorsements thereon, "and instructed them to find whether it was in the hands of the sheriff before the death of said Mobley." The jury having returned a verdict in these words, "We, the jury, find that said execution was in the hands of the sheriff before the death of Mobley;" the counsel for the administrator insisted, "that they should be instructed to find whether it was in his hands at the time of said Mobley's death; whereupon, the court instructed the jury, that if the execution was put in the hands of the plaintiffs' attorney (Cooke), for levy, and was so when Mobley died, it would be, in legal effect, constructively in the hands of the sheriff at the death of said Mobley." To this charge the administrator reserved an exception, and also to the rulings of the court in allowing the execution to go to the jury. The jury then returned the following verdict: "We, the jury, find that the execution was sent to Gainesville for levy."

As to the claim of exemption, the administrator testified that said Mobley, at the time of his death, "was the head of a family; that he left no wife or minor children, but had several children living with him, all of whom, he believed, were of age;" and this was all the evidence on the subject. On all the evidence adduced, and on the verdict of the jury above stated, the court granted an order of sale, as prayed by the plaintiffs; to which the administrator reserved an exception.

The errors now assigned are, the rulings of the court on the evidence, the instructions to the jury, and the judgment of the court on the motion.

COCKRELL & SNEDECOR, with whom was T. B. WETMORE, for appellant.

COOKE & LITTLE, *contra*.

STONE, J.—We do not think the Circuit Court erred, in holding that the writ of execution was in the hands of the sheriff at and before the death of Mr. Mobley, the defendant in execution. This operated a lien upon his property, from the time it was received by the sheriff; and this lien was kept alive by the re-issue of executions, without the



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lapse of an intervening term, until the levy was made; and the lien is still preserved, so far as we are advised.—*Hendon v. White*, 52 Ala. 597.

2. The remaining question arises on the claim of exemption asserted in favor of decedent's family. He left adult children, but neither wife nor minor child, surviving him. This claim depends on the statute, "To regulate property exempted from sale for the payment of debts," approved April 23, 1873.—Pamph. Acts, 64. That statute, section 3, declares, that "personal property, to the value of one thousand dollars, of any resident of the State, after his death, shall be exempt from the payment of debts; *Provided*, such decedent leaves surviving him a widow or child." This section is silent on the question of the minority of the child, and, unexplained, would appear to support the claim of exemption set up in this case. But this language does not stand alone, or unexplained. Section 12 declares, "That any person dying, leaving a widow, or child, or children, under the age of twenty-one years, members of his family, in addition to the exemptions heretofore made under this act, there shall be exempt" various other enumerated articles of personal property. Section 13 provides, "That whenever an executor or administrator makes out an inventory of the estate of any decedent, who left surviving him a widow, or minor child, it shall be his duty to permit said widow, or the guardian of such child or children, if there be no widow, or she does not act, to select the property exempt from administration for the payment of debts," &c. Section 14, "That any child, leaving the family of deceased, is entitled to an equal share of personal property reserved by exemption under this act, and which may be on hand at the time such child ceases to be a member of the family."

It will be observed that, under section 3 of the act, the same provisions are made in reference to the homestead, as are made in reference to the thousand dollars of personal property, after the death of the owner thereof. Each is, in the same language, declared to be "exempt from the payment of debts; *Provided*, such decedent leaves surviving him a widow or child." Yet, section 15, speaking of the homestead, says, "That the homestead exempted for the benefit of the widow and minor child or children under this act, may be retained," &c. This language clearly imports that, upon the death of the owner, the homestead does not descend, or continue exempt, unless there be a widow, or minor child or children. This is a legislative construction of the language employed in section 3, so far as it provides for a succession to the homestead, and we feel

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bound to give the language the same construction, when it speaks of the personal property.—*Alford v. Alford*, at the last term. We hold, that a surviving widow or minor child is necessary, under the act of 1873, to a continuance of the exemption of a thousand dollars of personal property, after the death of the execution-debtor.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

## Toomer, Sykes & Billups v. Randolph.

*Attachment against Non-Resident; Garnishment.*

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70 604  
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74 565  
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1. *Theory of mortgage, at law and in equity, as to rents and profits received by mortgagee.*—At law, in the absence of a reservation or stipulation to the contrary, the mortgagee has an immediate right of entry and possession, and, after default, the estate vests in him absolutely, leaving in the mortgagor nothing but the equity of redemption, of which courts of law do not take cognizance; but, in equity, the mortgagee is regarded as a trustee of the rents and profits for the mortgagor, and is bound to apply them to the extinguishment of the debt, after paying taxes, necessary repairs, &c.

2. *Garnishment against mortgagee.*—A second mortgagee can not by a garnishment against the first mortgagee, as the debtor of the mortgagor, reach and subject rents and profits received by the garnishee in excess of his debt.

### APPEAL from the Circuit Court of Hale.

The record does not show the name of the presiding judge.

This action was brought by the appellants, suing as partners, against Philip B. Cabell; and was commenced by attachment, sued out on the ground of the defendant's non-residence. The affidavit for the attachment was made on the 26th *January*, 1876, before a justice of the peace of the city and county of Mobile, by whom also the attachment bond was taken and approved; and it is recited in the bond that the attachment *has* been obtained, returnable to the next term of the Circuit Court of Hale. The attachment set out in the record, which is dated the 29th *February*, 1876, was issued by the clerk of the Circuit Court of Hale, and was executed by summoning T. B. Randolph, by process of garnishment, as the debtor of said Cabell. The plaintiffs' cause of action was the defendant's promissory note for \$706.84, dated the 25th *February*, 1874, and payable to the plaintiffs, at their office in Mobile, on or before the 1st *December*, 1874. The garnishee appeared, in answer to the summons, and filed the following answer:

"On or about the 28th *December*, 1870, this garnishee

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loaned to said P. B. Cabell the sum of \$5,000; for which said Cabell contracted and agreed to pay him ten per cent. *per annum* interest thereon; and said Cabell paid interest on said loan, according to said contract, up to 1st January, 1873. At the time of making said loan to said Cabell, he, the said Cabell, executed to this garnishee his promissory note, secured by a mortgage, with power of sale, upon the following lands," describing them; "a copy of which mortgage is hereto attached as a part of this answer, and referred to as a part of this answer. Said Cabell failed to pay any interest on said loan, after the 1st January, 1873; and thereupon, on or about the 1st January, 1875, garnishee took possession of said land under said mortgage, and rented it for the year 1875, for fourteen bales of cotton; of which rent, he collected twelve bales, and sold them on or about the 1st November, 1875, the net proceeds amounting to \$720, which was received by this garnishee; and the other two bales garnishee paid and allowed to the tenant, Sylvester Robinson, for repairing gin-house and screw. Afterwards, on or about the 6th December, 1875, garnishee proceeded to advertise and sell said real property, for the satisfaction of said debt, in accordance with the power of sale in said mortgage; and at the sale thereof, on the 6th December, 1875, had the same bid in for him, by his attorney, for the sum of \$6,651.43, there being no other bid for said property. Garnishee conveyed said lands, by deed, to one P. A. Tutwiler, for a consideration of \$6,651.43, and said Tutwiler immediately reconveyed said lands to him, for \$6,651.43; but no money was paid by said Tutwiler to garnishee, nor by garnishee to said Tutwiler. Garnishee had paid out on said land, taxes for 1874, \$100; taxes for 1875, \$100.72; advertising sale of said property, \$12; auctioneer's fee, \$5; and the interest on said mortgage debt, at the time of the sale, was \$1,464.59; and there was due from this garnishee to said Cabell, as a credit on said mortgage debt, the sum of \$35, for a cow bought of him. Plaintiffs hold a second mortgage on said lands. Garnishee does not deny their right, or the right of the defendant in attachment, to redeem said property, or to have the rent referred to appropriated, *pro tanto*, in extinguishment of said debt; and he is and has been willing, and has offered, to take in redemption thereof less than the amount actually due, deducting said rents. and now offers to do so. Otherwise than as may be shown by the above statement of facts, garnishee is not now, and was not at the time of the service of the garnishment in this case, indebted to the said P. B. Cabell, nor did he have any effects, goods, &c., belonging to said defendant, in his possession, or under his control."



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The mortgage set out in the record, as the one referred to in the answer, recites the payment of \$5,000 as its consideration, conveys the lands by the usual words of conveyance, and is conditioned as follows: "The conditions of the foregoing conveyance are such, that whereas the said Randolph hath this day loaned to the said Cabell the sum of \$5,000; for which the said Cabell has executed his promissory note, of even date herewith, payable to the said T. B. Randolph on the first day of January, 1872, with interest thereon from this date, for the sum of \$5,000: now, if the said Cabell do well and truly pay the said note, on or by the said 1st January, 1872, in that event, the foregoing deed shall cease to be of any force or effect, and forever satisfied and discharged; but, if the said Cabell shall fail, refuse, or neglect, well, truly, and fully to pay off the said note, or any part thereof, on or by the said 1st January, 1872, then the foregoing deed shall be of full force and binding; and the said Randolph shall be, and he is hereby, fully authorized and empowered, after giving due notice by publication, for the same [time?], and in the same way as is given by sheriffs in sales of land under execution, to sell said real estate, or so much thereof as may be necessary for the payment of said note, or whatever part thereof may remain unpaid; first applying the proceeds of sale towards paying and discharging the costs of executing this trust, and then satisfying said note and mortgage; and shall pay the balance, if any there be, to the said Cabell. And in case of a sale, the said Randolph is further authorized to make full and sufficient titles to the purchaser or purchasers."

On this answer, the court refused to render a judgment against the garnishee, and discharged him; and this judgment is now assigned as error by the plaintiffs in attachment.

JAS. E. WEBB, for the appellants.—By express stipulation in the mortgage, Randolph was bound to pay any balance remaining in his hands, after satisfying his debt, to Cabell; and he would have been equally liable to do so, without an express stipulation. For this balance, Cabell might have maintained an action of assumpsit, as for money had and received; hence, any creditor of his might reach and subject it by garnishment.—*Hitchcock v. Lukens*, 8 Porter, 353, and authorities cited in 1 Brickell's Digest, 175, § 314. The fact that plaintiffs are second mortgagees of the land, does not take away their right to sue out a garnishment. Their mortgage is no where set out in the record, and the court can know nothing as to its terms and conditions. As mortgagees,

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never having had possession, they could not recover the \$720 as rents, without proving more than is contained in this record. At most, they might elect to treat it as the money of their debtor, and subject it by garnishment. There was no tort to be waived by Cabell, as necessary to an action of assumpsit for the money. So soon as Randolph purchased at his own sale, he became the debtor of Cabell for this money, and will so remain until Cabell elects to set aside the sale in equity.—*Charles v. Dubose*, 29 Ala. 370; *Williams v. Hatch*, 38 Ala. 342; 45 Ala. 482; 1 Story's Eq. Pl. § 317. There is a marked difference between the ancient and the modern authorities, English and American, in reference to the relative rights of mortgagor and mortgagee; and the recognized doctrine now is, that a mortgage is but a security for a debt, and that a reception of the rents by the mortgagee, after the law-day, extinguishes the debt. The distinction between the ancient and the modern doctrine is pointed out in 1 Hilliard on Mortgages, 235, § 1: *Ib.* 453, § 6, 454, § 11. See, also, *Norton v. Willard*, 4 Johns. 42; *Ewer v. Hobbs*, 5 Metcalf, 1; 11 Johns. 534; 3 Black, 435; 16 Mass. 8; *Kennett v. Plummer*, 28 Mo. 145; 4 Kent's Com. (ed. 1858), 160, m. p.; 2 Brightly's Digest, 2659, § 1. An action for money had and received is an equitable action. Cabell might have maintained it against Randolph, without resorting to a court of equity; and his creditor might therefore sue out a garnishment.—*Davis v. Lassiter*, 20 Ala. 561; *Huckabee v. May*, 14 Ala. 263; 9 Pick. 171; 1 Hilliard on Mortgages, 423.

THOS. J. SEAY, *contra*.—At law, the mortgagee is regarded as the owner of the estate, and is entitled to the rents and profits in that character, subject to an accounting in equity. *Hubbell v. Moulson*, 53 N. Y. 225; *Hamner v. Harrell*, 2 Stew. & P. 323. Hence, Cabell could not maintain an action at law against Randolph, to recover the \$720 received as rents. Even if he could maintain such action, he might prefer to file a bill in equity to set aside the sale, and to make the mortgagee account; and the plaintiffs can not deprive him of this right of election.—*Lewis v. Dubose*, 4 Rich. 219; *Drake on Attachment*, § 545; *Bingham v. Rushing*, 5 Ala. 403; *Fellows v. Duncan*, 13 Metc. 332; 6 Humph. 328; *Turner v. Armstrong*, 9 Yerger; *Cobb v. Bishop*, 27 Vt. 624. If the \$720 received by Randolph is in excess of his entire debt, it belongs, *ex æquo et bono*, to the second mortgagees, and they may recover it by action in their own names against him.—*Webster & Wilson v. Singley*, 53 Ala. 208. Having that right of action, they can not reach it by garnishment.—*Cook v.*

[Toomer, Sykes & Billups v. Randolph.]

*Walthall*, 20 Ala. 334; *Henry & Caldwell v. Murphy*, 54 Ala. 246.

BRICKELL, C. J.—A mortgagee, if there is not in the mortgage a stipulation to the contrary, or a reservation by the mortgagor of possession until default in the payment of the mortgage debt, has the immediate right of entry, and may eject the mortgagor or his tenants.—*Duval v. McLoskey*, 1 Ala. 737; *Welsh v. Phillips*, 54 Ala. 309. The theory of a mortgage, prevailing in this State, is that, at law, it creates in the mortgagee a direct, immediate estate in the land—a fee simple, unless otherwise expressly limited. The estate is conditional—annexed to the fee is a condition, which may defeat it. If the mortgagor, not having reserved the right of possession until default in the performance of the condition, remains in possession, he is the mere tenant at will of the mortgagee. After the law-day, and default in the performance of the condition, the estate vests absolutely in the mortgagee—the fee is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which, as between mortgagor and mortgagee, courts of law do not take notice. Before default, all that remains in him is the right to perform the condition, and thereby restore his original estate.—*Paulling v. Barron*, 32 Ala. 11; *Barker v. Bell*, 37 Ala. 358; *Welsh v. Phillips*, *supra*.

In courts of equity, the theory of a mortgage is, that until foreclosure it is a mere security for a debt, the mortgagor continuing the real owner of the fee. From this theory results the general principle, that a mortgagee in possession, before or after default in the payment of the mortgage debt, and before foreclosure, is a trustee of the rents and profits for the mortgagor, and bound to apply them in extinguishment of the mortgage debt.—*Davis v. Lassiter*, 20 Ala. 561; 2 Wash. Real Prop. 221, § 9. All reasonable expenditures for taxes, necessary repairs, and other necessary expenses incurred on account of the estate, the mortgagee is allowed to retain from the rents and profits; and it is the balance only which may be applied in extinguishment of the mortgage debt. An accounting is necessary to the ascertainment of the balance. The law does not apply the balance of the rents and profits to the mortgage debt; for, at law, they accrue to the mortgagee, as the owner of the legal estate. It is in equity only the application is made, in the nature of an equitable set-off, and as an incident to the right of redemption.—*Hubbell v. Moulson*, 53 N. Y. 225.

2. If it is admitted that the mortgagor, notwithstanding the second mortgage to the appellants, has a right to compel



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the application of the rents received by the appellee while in possession, to the payment of the mortgage debt, the remedy is exclusively in equity, and is incidental to the right of redemption. In a court of law, the appellee is regarded as having received only and simply the issues of his own estate. A garnishment is strictly a legal proceeding, operating only on the rights of the defendant in attachment or judgment, which he could in an action at law enforce in his own name. It can not be converted into a method of drawing within the jurisdiction of courts of law matters and rights of purely equitable cognizance.—*Harrell v. Whitman*, 19 Ala. 135; *Roby v. Labuzan*, 21 Ala. 60; *Godden v. Pierson*, 42 Ala. 370; *Henry v. Murphy*, 54 Ala. 246.

What may be the rights of the appellants, as subsequent mortgagees, can not be considered or determined in the present proceeding. A garnishment is not a remedy for the enforcement of any cause of action vesting only in the creditor suing it out. Its whole scope and operation is to subject legal demands recoverable only by the debtor, or property of his which is subject to execution.—*Henry v. Murphy*, *supra*; *Thompson v. Wallace*, 3 Ala. 132.

There is no error in the record, and the judgment is affirmed.

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### *Statutory Action of Detinue for Horses.*

1. *Local law; preliminary notice; recitals of legislative journals.*—Although the constitution, by the 24th section of the 4th article, requires that notice shall be given of the intention to apply for the passage of a local law, it does not require that the journals shall affirmatively show that such notice was proved to have been given; consequently, when the journals are silent, the courts will presume, in favor of the validity of a local law, when signed by the presiding officer of each house, and approved by the governor, that proof was made of the preliminary notice.

2. *Legislative rules of proceeding in passage of bills; recitals of legislative journals.* Although the constitution, by the 21st section of the 4th article, requires that bills shall be read three times in each house on different days, it does not require that the journals of the two houses shall affirmatively show that this was done; nor is it necessary to the validity of a law that the journals should show the fact.

3. *Act to change boundary line between counties of Blount, Walker, and Jefferson, and authorize removal of county-seat of Blount; constitutionality of, as to title and subject-matter.*—The act approved February 8, 1877, entitled "An act to change the boundary line between the counties of Blount, Walker, and Jefferson, and to authorize the 'removal of the county-seat of Blount county,'" (Sess. Acts 1876-7, pp. 229-31), is not violative of the constitutional provision

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contained in the 2d section of the 4th article, which declares, "Each law shall contain but one subject, which shall be clearly expressed in its title."

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LOUIS WYETH.

This action was brought by Artelissa Walker, against Asa Griffith, to recover two horses, together with damages for their detention ; and was commenced on the 26th February, 1877. The defendant pleaded, in abatement, that he was a resident citizen of Walker county at the commencement of the suit ; and issue was joined on this plea. On the trial, as the bill of exceptions states, the defendant proved, in support of his plea, "that he was a resident citizen of the State of Alabama at the commencement of the suit, and was a householder and a freeholder, residing in that part of Walker county which was cut off from said county of Walker, and added to said county of Blount, by the act of the legislature of Alabama, approved February 8, 1877, entitled 'An act to change the boundary line of the counties of Blount, Walker, and Jefferson, and to authorize the removal of the county-seat of Blount county.'" This being "substantially all the evidence," the court charged the jury, that said act was unconstitutional and void, because it contained more than one subject, and that they must find for the defendant, if they believed the evidence. This charge, to which the plaintiff excepted, is now assigned as error.

The said act of the legislature, which may be found in the Session Acts 1876-7, pp. 229-31, is in the following words :

"An act to change the boundary line between the counties of Blount, Walker, and Jefferson, and to authorize the removal of the county-seat of Blount county.

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the county line between Blount, Walker, and Jefferson counties shall commence at a point where Blount, Cullman and Walker counties meet or corner, and shall run thence due west to range line number (5) five, west ; thence due south, along said line, to the Jefferson county line ; thence along said line dividing Jefferson and Walker counties, in a northeasterly direction, to the southeast corner of section six, township fourteen, range three, west ; thence due east, to the line now dividing the counties of Blount and Jefferson ; thence, with the present boundary line between Blount, Jefferson, St. Clair, Etowah and Cullman counties, to the point of beginning.

"SEC. 2. *Be it further enacted*, That William G. Byars, William Drennen, William Warren, William M. Crump, and W.F. Dickinson be, and the same are hereby, appointed a

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board of commissioners, for the performance of the duties and exercise of the powers hereinafter enjoined and conferred upon them, a majority of whom may act in the premises.

"SEC. 3. *Be it further enacted*, That said board of commissioners are hereby empowered and directed to divide said county into election precincts to the best convenience of the people, and to designate the place of voting therein as soon as practicable, and to give notice of boundaries of said precincts and places of voting therein, by publication in some newspaper published in said county, for at least twenty days previous to the election hereinafter provided for. The said board shall hold an election on the second Monday of April, 1877, in said county, by giving at least thirty days' notice thereof, by advertising in some newspaper published in said county, for the selection of a permanent county-seat, that Blount Springs and Blountsville may be voted for as said county-seats by the qualified electors therein; those voting for Blount Springs to put in a ballot upon which the words '*Blount Springs*' shall be written or printed, and those voting for Blountsville shall put in a ballot upon which [Blountsville] shall be written or printed; that said commissioners are empowered to appoint three inspectors and one returning officer for each election precinct in said county to hold said election, who shall be governed in their duties by the laws regulating elections in this State; that said returning officers shall make their return to said commissioners, at Blountsville, Alabama, within forty-eight hours after said election; that said commissioners, after duly counting the votes, shall make certified returns thereof to the governor of Alabama, within five days from the day of election; that within ten days thereafter, the governor, secretary of State and auditor shall count the votes, and the governor shall by proclamation declare the place that is selected as the county-seat by the majority of the votes cast at said election.

"SEC. 4. *Be it further enacted*, That the citizens of the said counties of Walker and Jefferson, which shall, by the provisions of this act, be attached to the county of Blount, be and the same are hereby required to assume and pay their *pro-rata* share of the existing indebtedness of Walker and Jefferson counties, portions of which are attached to Blount county by this bill; which shall be ascertained and paid as provided by section 29 of the Revised Code.

"SEC. 5. *Be it further enacted*, That the present officers of Blount county shall hold their offices until the expiration of the time for which they were elected or appointed, subject, however, to the conditions now imposed on them by law."



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THOS. H. WATTS, with TERRY &amp; LANE, for appellant.

Neither the record nor the docket shows the names of the counsel, if any, who appeared for the appellee; and there are no briefs on file.

MANNING, J.—The question presented for our determination in this cause is, whether or not the "*act to change the boundary line between the counties of Blount, Walker, and Jefferson, and to authorize the removal of the county-seat of Blount county,*" approved February 8, 1877, is a valid enactment. It is supposed to be obnoxious to, or that it was not passed in accordance with, several provisions of the constitution.

Doubtless, the sections of that instrument which prescribe rules concerning the introduction and progress of bills through the two houses of the general assembly, and the conduct of their business, are mandatory upon the members of those bodies. The obligation to observe them, arising from their accepting the position of legislators, is confirmed by the official oath they take—the same oath by which judges are bound to a faithful and conscientious discharge of their duties.

There is a wide difference, however, between the functions and modes of proceedings of the legislative, and those of the judicial department of the government; and out of this difference arises a political necessity, recognized in the constitution itself, that each shall, in its action, be almost wholly independent of the other. Except in the few instances in which the duty is expressly imposed by the constitution, or required by the plain meaning of its provisions, and in those cases, perhaps, in which the journals of the senate and house of representatives affirmatively and conclusively show that the rules of proceeding prescribed to them by the constitution have not been observed, it would generally be practically as inconvenient and difficult, as it would be unseemly, for the judiciary to undertake to regulate, or critically to scrutinize, the manner or degree in which the legislature conforms to, or disregards, the requirements of parliamentary law in the transaction of its business.

However formally and unexceptionably a statute may have been passed by the general assembly, yet, whether its provisions do not contravene the constitution of the State, or of the United States, or treaties made by the latter,—to which all the departments of the State government must yield obedience,—and whether the courts are not forbidden by this superior law from enforcing such enactment, and re-

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quired to pronounce it void, are questions which, when properly presented, they must, from the very nature of our American institutions, consider and determine. This is one of the most effective and least offensive of the means which have been devised, for securing the liberties and privileges that the people have reserved, in their constitutions of government, from legislative encroachment. One of its unavoidable effects, however, is a vast amount of litigation concerning constitutional questions, and a consequent uncertainty in our statute law; evils by which the people and courts of England, under their "omnipotent" parliament, are never vexed. But it would greatly increase these inconveniences, without securing corresponding benefits, if, when acts purporting to be those of the legislature are produced, after having been engrossed and enrolled under the supervision of the proper committees of the two houses, and authenticated by the signatures of the speaker of one and the president of the other, and then approved and signed by the governor, and filed in the office of the secretary of State, the courts must still, except in the instances before mentioned, determine whether they had been passed in minute compliance with all the rules of proceeding prescribed by the constitution for conducting bills through the process of enactment into laws. In such inquiries, the journals would, of course, have to be resorted to; and when the constitution requires that a particular thing shall be necessary to the validity of an act of legislation, and that the journal must show that this thing was done,—as, for instance, the passage of a bill by yeas and nays which shall be entered on the journals,—unless they do show it, the act can not be accepted as constitutionally adopted. The thing thus required is an additional means, outside of the enrolled act, but in concurrence with the signatures of the speaker of the house of representatives and president of the senate upon it, authenticating its passage through the two houses, and renders the forgery of such an act more difficult. And as the passage of it by the yeas and nays can not, according to the constitution, be shown otherwise than by the journals, they must, in respect to it, "import absolute verity." The existence or non-existence of the statute depends on their testimony, whether they speak or are silent.

But, except in such cases, their mere silence does not invalidate. The principal objects, in requiring the journals to be kept, probably were: first, that the members might be thereby informed, from day to day, of the progress and state of the business before them; and, secondly, that constituencies might afterwards see how their representatives had per-

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formed their duties in the public councils. But, certainly, the journals are, in many respects, too defectively kept, to be much relied on as evidence in the courts ; for the reason that they rarely set forth correctly all of the proceedings, however faithful the officer who writes them up may be.

Discussing provisions in the constitution of New Jersey, similar to those in our constitution, the Supreme Court of that State, in a very able opinion by Chief-Justice Beasley, said : " Its language is, ' Each house shall keep a journal of its proceedings, and from time to time publish the same ; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.' And by the last clause of paragraph sixth, it is further directed, . . . ' that the yeas and nays of the members voting on such final passage shall be entered on the journal.' These are all the constitutional requirements relating to these diaries ; and it will be observed that, with the exception of recording the yeas and nays, there is no prescription in the constitution of what they shall contain. They are not required to be attested in any way whatever ; nor is it said that they shall even be read over to the houses, so that their correctness may stand approved. . . . In the nature of things, they must be constructed out of loose and hasty *memoranda*, made in the pressure of business, and amid the distractions of a numerous assembly. . . . Can any one deny that, if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its foundation ?"

Serious, indeed, would be the consequences, no less in reference to past legislative acts, under which the affairs of communities and of individuals may have been long administered, than in reference to future enactments, if they must be tried, to the extent contended for, by such fallible and fallacious tests. It would almost be impossible to know which of the acts, published from time to time in the statute-books as laws, were laws in fact. Whenever a case should arise under any of them, the printed journals of the two houses would be poured over and scrutinized, to ascertain when and how the bills in which they had their origin were introduced, and what motions had been made, readings had, references ordered, amendments proposed, and votes taken, in respect to them, for the purpose, by these examinations, of finding out objections, to be raised in the courts, to the validity of such acts. The journals would become as important to the ascertainment of what the law is, as the statute-books themselves ; and few persons could be sure that they were not



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violating the law, in their endeavors loyally to obey it. Instead of being enlightened concerning their rights and duties, the people would find increased uncertainty; and legislation would become, more than ever, a source of continual and oppressive litigation. We, therefore, unhesitatingly agree in the opinion of Judge Cooley, that it should "not be presumed, in any case, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken; as, for instance, where it requires the yeas and nays to be entered."—Const. Lim. 135–6.

We refrain from going into any more detail in respect to our conclusions, because there are cases before us, in which the question may be considered in other aspects. Of course, though, we do not hold that judges are prevented from examining the journals, or seeking evidence elsewhere, to satisfy themselves, as it is their duty to do, of the existence of a law, or of the time when it was enacted, when a well-founded doubt of either may exist. Such investigations are within the province of the courts; and upon this subject, there have been delivered several learned and well-considered opinions.—*Gardner v. Collector*, 6 Wallace, 499; *The People v. Devlin*, 33 N. Y. 278, *et seq.* But the courts are not at liberty to treat as void acts which are authenticated, in the long-used and proper manner, as statutes of the general assembly, because the journals do not show that they were passed in accordance with all the rules of parliamentary law prescribed in the constitution for the conduct of legislative business.

Accordingly, this court has heretofore held, since the constitution does not expressly require the journals to show that the notice prescribed by section 24 of article IV, of an intention to apply for the passage of a local or special act, was in fact given, that we will presume, when the journals are silent, that the legislature did not pass such a bill without sufficient proof on that subject.—*Harrison v. Goudy*, at the last term. The assignment of error based on that section is, therefore, not sustained.

For the same reasons, we decline to pronounce the act under consideration void, because it does not appear by the journals (if, indeed, it does not) that the bill in which it had its origin had received three readings in each house. If the journals do not show that it had been read three times, it is to be presumed that the members knew that this had been done, from their own participation in the proceedings, or from memoranda on the bill, when they voted for its passage.

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The other objection, relating to the unity of the subject of the act, is to be determined, not by reference to the journals, but by a consideration of the act itself, and of the title to it. Section 2 of article IV of the constitution ordains, that "each law shall contain but one subject, which shall be clearly expressed in its title;" and this clause is supposed to be infringed by the act in question. It is insisted that the title of the act sets forth, and the body of it contains, two distinct subjects; one to change boundary lines between three contiguous counties, and the other to change the site of the court-house of one of them. In looking into the act, we see that the change made in the boundary lines mentioned, has the effect of enlarging Blount county, by annexing to it some of the territory that formerly belonged to the counties of Walker and Jefferson, respectively; and a consequence of this, doubtless, was to put the present court-house at a distance from the centre of Blount county; wherefore, provision was made for selecting for it another location. The real operation of the act is to *reconstitute Blount county*; and this it does, by adding to it the territory referred to, and by providing for the selection of another county-seat.

Suppose the title were simply, "*An act to reconstitute Blount county*;" under this title, it would be allowable to change the boundary upon any side of Blount county, or entirely around it, and to change the county-seat. All of this would be entirely germane to the subject expressed in that title; and whatever is germane to, and congruous with the subject of a statute, may be embodied as a part of it in the same act, without destroying the unity of the subject.—*Board of Revenue v. Barber*, 53 Ala. 589; *Ex parte Hickey*, 52 Ala. 229. The subject of a statute may be a large one, having several branches, and requiring much detail; as an *act to raise revenue*, for instance. And it would protract the work of legislation enormously, and make it almost impossible of performance, if the constitutional provision in question were so construed, as to require a separate statute for the enactment of each detail. There can be no doubt, that the general title above suggested for the act under discussion would authorize the introduction into the act of all the provisions it now contains, and more.—See *People v. Mahony*, 13 Mich. 500; *Blood v. Mercelliott*, 53 Penn. St. 391; *Cooley's Con. Lim.* 145, *et seq.*; *Harris v. People*, 59 N. Y. 599. And it thence follows that this act does not contain more than one subject.

Is this subject clearly expressed in the title? Certainly, what the statute enacts is defined with more precision, than it would be under the more comprehensive title expressive of a single subject, above set forth as sufficient. For this

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would afford a larger scope for details, relating to the same subject, than is allowed by the title really adopted. The fault of this title is, that, while it is very restricted, and leaves but little margin for an expansion of the subject of the act, it seems, by its particularity in specifying details, to indicate two subjects in the act. But this is a misconception, as a mere transposition of the clauses composing the title will tend to show. Let it be read as follows: "*An act to remove the county-seat of Blount county, and to change the boundary line between the counties of Blount, Walker, and Jefferson.*" This makes it more evident that the subject of the act is the reconstruction or reconstitution of Blount county, to the limited extent explained by the title. But this is made apparent, not by changing the meaning of the title, but the order of the two clauses composing it.

The object of the constitutional provision is two-fold: first, truly to inform members, who are to vote upon the bill, what the subject of it is, so that they may not perform that duty, deceived or ignorant of what they are doing; and, secondly, to prevent the mischievous legislative practice known as "log-rolling;" that is, of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures, into a majority that will adopt them all. No object of the constitutional provision referred to is defeated or impugned by the title of this act, or by the act itself; and we cannot hold that the constitution makes the statute void.

Let the judgment be reversed, and the cause be remanded.

## Winn v. Dillard.

*Appeal from Interlocutory Decree in Chancery; Motion to Dismiss.*

1. *To what term appeal should be taken.*—An appeal from an interlocutory decree in chancery, overruling a demurrer to a bill, or a motion to dismiss for want of equity, etc. (Code of 1876, § 3918), should be taken to the first Tuesday in some month during the pending term of this court (§ 3925), if the legal notice can be given, and not to the next term; otherwise, the delay and cost of protracted litigation, which the statute was intended to prevent, will not be avoided, and the object of the statute will be frustrated.

2. *Waiver of appeal.*—When a defendant in a chancery cause, having prayed and obtained an appeal from an interlocutory decree overruling a demurrer to



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the bill, files an answer and cross-bill before the return of the appeal to this court, or takes any other steps in the cause inconsistent with the pendency of the appeal, he thereby waives the appeal, and it will be dismissed on motion.

3. *When cross-bill must contain equity.*—When a cross-bill sets up matters in defense only of the original bill, it is not necessary that such matters should be of equitable cognizance, as distinguished from legal demands; but, when it seeks relief as to independent matters outside of the case made by the original bill, except by way of set-off, it must show some ground of equitable jurisdiction.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 17th December, 1875, by A. W. Dillard, against Mrs. Willie G. Winn; and sought a rescission of a contract made in August, 1872, by which the defendant sold and conveyed a tract of land to the complainant. A rescission of the contract was sought on the ground that the lands were very much infested with "cocoa grass" and "wire grass," which greatly impaired their value, and rendered their cultivation more difficult and costly, while they were unfit for pasturage; that this fact was not known to the complainant at the time he made the contract, and was not communicated to him by the defendant, to whom it was well known. Besides a rescission of the contract, and the cancellation of the notes given for the purchase-money, the bill prayed an account of the taxes paid, the value of the improvements erected by him on the land, and the reasonable rent during his occupation, and a decree for whatever balance might be found in his favor, with a lien on the land for its payment. There was a demurrer to the bill, which was partly overruled; and after praying an appeal from the decree on the demurrer, the defendant filed an answer and cross-bill, setting up therein a sale of the land, after the filing of the original bill, under a deed of trust given to secure the payment of the notes for the purchase-money, and the defendant's purchase at that sale, for a sum less by \$2,000 than the unpaid purchase-money; and praying an account of the amount still due for the purchase-money, and of the rent of the land, or the value of the use and occupation by the defendant, subsequent to the sale. The chancellor sustained a demurrer to the cross-bill, and dismissed it; and from that decree, also, an appeal was taken by the complainant therein. Both appeals are included in one transcript. The errors here assigned are—1st, the overruling of the demurrer to the original bill; and, 2d, the sustaining of the demurrer to the cross-bill. On the part of the appellee, a motion was submitted to dismiss the appeal from the decree on the demurrer to the original bill, and to strike out the assignment of error founded on that decree; and the cause was at the same time submitted on the merits.

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J. T. JONES, for the appellant.—1. The appeal from the decree on the demurrer to the original bill was taken within thirty days, the time prescribed by the statute; and it was neither abandoned, nor forfeited by afterwards filing an answer and cross-bill. The statute authorizing such appeals does not require nor contemplate a suspension of proceedings in the court below. If the decree is here affirmed, the answer and cross bill bring the case so much nearer to a final hearing, and thus avoid delay; and if it is reversed, and finally disposed of on the demurrer, the appellant only is injured. If the answer or cross-bill was irregularly filed, they should be struck from the files.

2. The cross-bill was necessary and proper, since the relief asked by it could not be had under the answer.—*Gallagher v. Witherington*, 29 Ala. 420; *Goodwin v. McGhee*, 15 Ala. 233.

COLEMAN, CLARKE & McQUEEN, *contra*.—1. The first appeal, which was taken on the 22d April, 1876, was waived and forfeited, because it was not prosecuted to the next ensuing term of this court; and for the further reason, that the filing of the answer and cross-bill were inconsistent with the pendency of an appeal in this court.

2. The cross-bill was properly dismissed, because it was unnecessary, so far as it set up matters of defense; and because it sought relief as to mere legal demands, outside of matters set up in the bill.—Story's Eq. Pl. §§ 389, 398; Mitford's Eq. Pl. 28, 64; *Alston v. Alston*, 34 Ala. 15-29; *Weed v. Small*, 3 Sandf. Ch. R. 273; *Fife v. Clayton*, 13 Vesey, 546; *Garner & Neville v. Leverett*, 32 Ala. 410.

BRICKELL, C. J.—The appellee filed an original bill, for the rescission of a contract for the purchase of lands, made with the appellant. The bill was filed in the proper chancery district; but, the chancellor having an interest in the suit, on the application of the appellant it was transferred to another division and district. At the time of the transfer, the case was standing for hearing, on the demurrer of the appellant to the original bill, no answer having been made. After the transfer, additional grounds of demurrer were filed; and a decree was rendered, overruling the demurrer in part, and in part sustaining it. From this decree, an appeal to this court was, within thirty days, prayed and obtained by the defendant. On the day of taking the appeal, the cause was re-transferred to the court in which it had been commenced. Six days thereafter, the appellant filed her answer to the original bill. The bill was subsequently amended, to

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cure the defects which were supposed to exist, in the particular in which the demurrer had been sustained. Thereafter, the appellant filed a cross-bill; to which the appellee demurred, and the demurrer was sustained. From the decree overruling the demurrer to the original bill, and from the decree sustaining the demurrer to the cross-bill, this appeal is prosecuted, and the assignments of error are the rendition of each decree. A motion is now made to strike out the first assignment of error, relating to the decree overruling the demurrer to the original bill, and to dismiss the appeal, so far as respects that decree. On that motion, and on the assignment of error relating to the cross-bill, the cause was submitted.

Prior to the statute of March 20, 1875, now forming section 3918 of the Code of 1876, an appeal would not lie from a decree overruling a demurrer to a bill in equity, unless the complainant consented of record to the prosecution of such appeal.—*Hightower v. Kennedy*, 11 Ala. 562; Rev. Code, § 3486. The reason is, that, in our practice, such a decree is not final. The defendant has the unqualified right to plead, or answer, after the demurrer is overruled. The cause remains pending and undetermined, and it may be, on a final hearing, a decree will be pronounced in his favor, rendering harmless the decree overruling the demurrer. It may be, also, that on the final hearing the chancellor may be satisfied he was in error in overruling the demurrer; and if he was, and the defect is incapable of being cured by amendment, he is not bound to persist in the error, but may render the proper decree, dismissing the bill, though it is supported by evidence. A final decree, disposing of the equities of the case, declaring finally the rights and liabilities of the parties, alone would, prior to the statute to which we have referred, support an appeal.—*Garner v. Prewitt*, 32 Ala. 15. The result, in practice, was, that parties were sometimes compelled to the delay and cost of protracted litigation on the facts of cases, which, on demurrer, ought to have been pronounced not within the jurisdiction; or pleas were sustained, or overruled, on which, if the proper judgment had been rendered in the primary stages of the cause, the litigation would have terminated.

To remedy this evil, the statute affords the right of appeal, from a decree sustaining or overruling a demurrer, or a motion to dismiss a bill for want of equity, or sustaining or overruling a plea to such bill, if the appeal is taken within thirty days after the rendition of the decree; and in this court, the appeal is to be heard in preference to other than criminal cases, and the court is commanded to render the decree the chancellor should have rendered, if the decree is



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reversed. Avoiding the delay and continuance of litigation, incident to the practice under pre-existing statutes, is the evil the statute is manifestly designed to cure. When construed in connection with a statute enacted at the same session (§ 3925, Code of 1876), authorizing appeals to be taken to the first Tuesday of any month during the session of this court, if the legal notice of appeal can be given, the appeal ought to be taken and prosecuted under that statute, and not to the succeeding term of the court. Otherwise, the evil against which the statute is directed, will not be avoided. For several months proceedings in the Court of Chancery could be suspended, awaiting the prosecution of the appeal taken within the prescribed time. We do not say, however, in the present case, that an appeal taken to the next term will be dismissed.

2. A party, after claiming and obtaining an appeal from the interlocutory decree sustaining or overruling a demurrer, or a motion to dismiss, or sustaining or overruling a plea, cannot take steps in the cause, in the Court of Chancery, inconsistent with the prosecution of the appeal. The statute confers the right of appeal from such decrees, as a mere privilege, which a party may or not exercise. If he does not exercise it, and the final decree is adverse to him, from that he may prosecute an appeal, and assign as error the rendition of the interlocutory decree. The right the statute secures, is a revision in this court of the interlocutory decree, and a judgment which must exert a controlling influence on the final decree. While exercising the privilege of obtaining from this court a revision of the interlocutory decrees, proceedings in the Court of Chancery, in the order which must be observed if the appeal had not been taken, and which are necessary, or proper, only in the event of the affirmance of the decree, are inconsistent with the appeal; and, if taken before the return of the appeal to this court, must be regarded as a waiver of it. By pursuing several distinct rights at the same time, a party cannot compel his adversary into the vexation and expense of double litigation. If the appeal from the decree overruling the demurrer to the original bill was well taken, no answer from the appellant was necessary, or proper; and without an answer, a cross-bill could not be filed. The answer was only necessary, in the event of the affirmance of the interlocutory decree. By answering, after having taken the appeal, the appellant lost the right of insisting on, and prosecuting it.

Under our statutes, prior to the Code, pleading to an amended declaration was a waiver of the right on error to question the correctness of the order allowing the amend-

[McCrary's Adm'r v. Rash's Adm'r.]

ment (*Caldwell v. May*, 1 Stew. 425); and an amendment of the declaration was a waiver of the right on error to revise the judgment of the court on the demurrer to the original.—*Stallings v. Newman*, 26 Ala. 300. The principle was, that there was an acquiescence in the judgment, inconsistent with the right subsequently to assail it. The principle applies to the case now presented; and the right of prosecuting the appeal from the interlocutory decree was lost by the subsequent proceedings taken in the cause by the appellant. The revision of that decree can now be had, only on an appeal from the final decree, if that is adverse to her. It follows, the motion to strike out the first assignment of error, relating to the decree on the demurrer to the original bill, must be sustained, and the appeal, as to that decree, dismissed.

3. We concur with the chancellor, that the demurrer to the cross-bill was well taken. The demands in respect to which the relief is prayed, are mere legal demands, for the recovery of which the law affords adequate remedies. If relief, not defense, is the object of a cross-bill, the claim and title of the complainant in it must be equitable. When it is said that a cross-bill must not of necessity show any ground of equity to support the jurisdiction of the court, it must be taken as applied to bills making defense, and not to such bills seeking relief.—Story's Eq. Pl. §§ 398-99. Nor is it the appropriate function of a cross-bill to set up, otherwise than by way of set-off, a distinct claim against the complainants in the original bill.—Story's Eq. Pl. 398, *b*; *Rowan v. Sharp's Rifle Co.*, 33 Conn. 1. Let the decree on the cross-bill be affirmed, and the cause remanded.

## McCrary's Adm'r v. Rash's Adm'r.

*Action on Note under Seal, given for Price of Slave.*

60 374  
66 268  
66 571  
71 106  
73 504  
73 247  
73 262  
74 218  
Continued.

Continued.  
77 526  
82 231  
82 314  
84 63

1. *Competency of parties as witnesses in civil cases; exception as to actions by or against administrators, and statements or transactions by or with decedents.*—Under the statute relating to the competency of parties as witnesses in civil cases (Code of 1876, § 3058), the exception which declares that "in suits or proceedings by or against executors or administrators, neither party shall be entitled to testify against the other, as to any transaction with or statement by any deceased person whose estate is interested in the result of such suit," &c., applies to and excludes the distributees of the estate, who, though not nominally parties, are beneficially interested in the result of the suit.

2. *Charge misleading jury.*—A charge which is calculated to mislead the jury, but not otherwise objectionable, is not a reversible error; the party objecting to it should ask an explanatory charge.

[McCrary's Adm'r v. Rash's Adm'r.]

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. LOUIS WYETH.

This action was brought by John B. Tally, as the surviving administrator of the estate of William Rash, deceased, against Samuel McCrary, and revived, on his death *pendente lite*, against Thomas N. Allison, as his administrator; was commenced on the 15th August, 1872; and was founded on a bond, or promissory note under seal, for \$1450.—which was executed by Leroy McCrary, since deceased, and by said Samuel McCrary, and one George Rogers, dated the 15th April, 1859, and payable twelve months after date, to Laxon Rash and said John B. Tally, as administrators of the estate of William Rash, deceased; and which recited on its face that it was given for the purchase-money of a slave. The defendant pleaded, “in short by consent,” 1st, accord and satisfaction; 2d, payment; 3d, set-off; and 4th, a special plea of payment by the transfer to said Laxon Rash, since deceased, one of the payees of the note, and then co-administrator with plaintiff, of a promissory note made by one Emery, and payable to said Leroy McCrary, one of the makers of the note sued on; and issue was joined on all these pleas.

On the trial, as the bill of exceptions shows, the plaintiff having read the note in evidence to the jury, the defendant offered to prove the declarations, or admissions, of said Laxon Rash, deceased, to the effect that the note was paid to him, in 1863, in Tennessee, in Confederate money, by Leroy McCrary, who was the principal debtor, the other makers having signed it as sureties for him; and that he had distributed the money among the distributees of the estate, retaining a part as his own distributive share. These declarations, or admissions, he offered to prove by the testimony of James Champion, who had married a daughter of said Samuel McCrary, and by the depositions of George Rogers, who had married another daughter of said McCrary, and of Almond McCrary, his son. This testimony was excluded from the jury by the court, on motion of the plaintiff, on the ground that said witnesses, though not parties to the record, “were interested in this cause as parties by implication,” being distributees of the estate of said Samuel McCrary; to which ruling, in the case of each one of said witnesses, an exception was reserved by the defendant.

The court charged the jury, on the request in writing of the plaintiff, “that the only manner in which Confederate States treasury-notes had a pecuniary value affixed to them by law, was by reason of public policy, and the laws of each State in which such currency had a circulation; and the



[McCrary's Adm'r v. Rash's Adm'r.]

court can not judicially know, or charge the jury, that such treasury-notes had a value in Tennessee in 1863, at the time of said alleged payment." To this charge, also, the defendant excepted.

The exclusion of the evidence, and the charge of the court, are now assigned as error.

L. C. COULSON, for appellant.

L. P. WALKER, *contra*.

STONE, J.—Section 3058 of the Code of 1876, being the act of March 2, 1875 (Pamph. Acts, 252), is, in some respects, materially different from section 2704 of the Revised Code. Each declares that, as a general rule, being a party to the record, or interested in the issue tried, does not disqualify a witness in a civil cause. The exception found in section 2704, Revised Code, is in the following language: "In suits or proceedings by or against executors or administrators (as to which a different rule is not made by the laws of this State), neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party." The meaning of the clause in parenthesis is, that this exception applied to all such cases, unless some case should arise, for which the Code, in some other clause, made a different rule or provision. The act of March 2, 1875 (Code of 1876, § 3058), provides, "that neither party shall be allowed to testify against the other, as to any transaction with, or statement by any deceased person, whose estate is interested in the result of such suit." It will be readily seen that this enlarges the exception. In the former statute, the exclusion applied only when the "suit or proceeding was by or against an executor or administrator," and it was confined to "transactions with, and statements by the testator or intestate." Under the present statute, the exclusion applies to all classes of suits or proceedings, provided the offer be to prove, by a party to the suit, a transaction with, or statement by some deceased person, whose estate is interested in the result of the suit. The first was confined to a testator or intestate, whose personal representative was, as such, a party to the suit, and to transactions with, and statements by such [deceased] testator or intestate. The latter includes transactions with, and statements by *any deceased person*, whose estate is interested in the result of the suit. The latter statute contains another exceptional clause not found in the former. It provides that parties to the suit shall not tes-

[McCrary's Adm'r v. Rash's Adm'r.]

tify in their own favor, as to transactions with or statements by any deceased person, who, "at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced." This clause scarcely needs comment. It provides a rule different from that declared in *Baldwin v. Ashley*, 54 Ala. 82, which arose under the older statute.

The purpose of the exception, in each of these statutes, was to exclude the testimony of parties to the suit, when offered in their own behalf, to show transactions with, or statements by persons who have died, and consequently can not confront, and, perchance, contradict such testimony. It rests on the fear that personal interest will exercise an influence too controlling, unless it is confronted by an adversary interest, having equal knowledge of the facts. This exception has been uniformly upheld in its integrity, as a necessary restraint of abuses likely to grow out of the section of the Code we are considering. See *Rupert v. Elston*, 35 Ala. 79; *Kirksey v. Kirksey*, 41 Ala. 626, 634; *Waldman v. Crommelin*, 46 Ala. 580; *Stallings v. Hinson*, 49 Ala. 72; *Davidson v. Rothschild*, 49 Ala. 104.

The amendment of the section under discussion, extending, as it does, the restraints on parties testifying against decedents' estates in adversary interest, furnishes an additional reason why we should not cripple this salutary exception, in its beneficent operation. So, it has been held to apply to persons standing in the relation of beneficiaries, who, though not parties to the suit, are directly interested in the result.—*McLemore v. Nuckolls*, 37 Ala. 660, 672; *Key v. Jones*, 52 Ala. 238, 247. See, also, *Walker v. Walker*, 34 Ala. 469; *Tisdale v. Maxwell*, at present term.

Under the rule declared in the cases of *McLemore v. Nuckolls*, and *Key v. Jones*, *supra*, the witnesses, Rogers, Champion, and Almond McCrary, were incompetent to testify to transactions with, and statements by Rash, the deceased administrator; and the Circuit Court did not err in excluding that part of the evidence.

2. The charge given and excepted to may have been, and probably was, calculated to mislead the jury. That is no ground for reversal. It was the privilege and duty of the defendant to ask an explanatory charge, by which the objectionable tendency of it could have been averted and healed. 1 Brick. Dig. 344, § 129.

The judgment is affirmed.

BRICKELL, C. J., not sitting, having been of counsel.

[Ex parte Cresswell.]

*Ex parte Cresswell.**Application for Mandamus to Chancellor.*

1. *Power of chancellor, at subsequent term, to set aside final decree.*—A chancellor has no power to set aside and vacate, at a subsequent term, of his own motion, a final decree rendered at a former term, although matters of account in the cause are still pending under a reference to the register.

Application by petition, by Mrs. Louisa W. Cresswell, for a *mandamus* to the Hon. A. W. DILLARD, chancellor of the Western Chancery Division, presiding in the Chancery Court of Greene county, on the facts stated in the opinion of the court.

JAS. E. WEBB, for petitioner, cited *Ansley v. Robinson*, 16 Ala. 793; *Bradford v. Barclay*, 37 Ala. 453; *Van Dyke v. The State*, 22 Ala. 54; *Watt v. Watt*, 37 Ala. 547; *Byrd v. McDaniel*, 26 Ala. 585; *Ex parte Carroll*, 50 Ala. 9; *Boyles v. Maddox*, 43 Ala. 357; *Ex parte Lowe*, 20 Ala. 333; *Cockrell v. Hayes*, 41 Ala. 75.

BRICKELL, C. J.—This is an application for a *mandamus* to the chancellor of the Western Division, commanding him to vacate and annul an order made by him on the 30th November, 1877, whereby he set aside a final decree rendered by him on the 27th November, 1875, in favor of the petitioner, and against Samuel L. Cresswell and others. The facts, as shown by the application and its exhibits, are—that on the 6th October, 1874, the petitioner, a married woman, by her next friend, filed in the Chancery Court of Greene county her original bill, against her husband, Samuel L. Cresswell, James Crawford, William G. Jones, and William D. Dunn, to enforce a trust in and to certain lands, which her husband had aliened and conveyed to Crawford, and which he had conveyed to Jones and Dunn, in trust for the benefit of his creditors. The defendants were regularly brought into court. There was a decree *pro confesso* against the husband, and the other defendants answered, incorporating a demurrer in the answer. At the November term, 1875, the cause was submitted, on pleadings and proofs, for final decree. A decree was rendered, overruling the demurrer, declaring and enforcing the trust, and directing the defendants to deliver pos-



[Ex parte Cresswell.]

session of the lands to the complainant; and in the event they failed, directing that proper process issue to the sheriff to put her in possession. The register was ordered to take and state an account of the value of the rents and profits of the lands, during the years 1874 and 1875, while in possession of the trustees, Jones and Dunn. It was further decreed, that the complainant pay the costs, "and recover them of the assignees of James Crawford, out of the rents of the land." The register, having taken an account of the rents, reported to the June term, 1876, the amount thereof. It is not certain, from the transcript of the record exhibited with the application to this court, whether that report has been confirmed, or whether the further orders of the chancellor were made on a motion for its confirmation. At the June term, 1877, the chancellor, being of opinion that the original decree was erroneous, declined to make any further orders in the cause. At the November term, 1877, he reviewed the original decree, of his own motion, pronounced it erroneous, and made the order now complained of, annulling that decree, sustaining the demurrer he had previously overruled, and dismissing the bill, at the costs of the next friend of the complainant.

It is too plain for argument, that the action of the chancellor is indefensible. No principle of law is more plainly settled, or of more universal application, than that no court can, after a hearing on the merits, with the parties properly before it, reverse or annul its own final decrees or judgments, for errors of facts, or of law, after the term in which they have been rendered. After the lapse of the term, the extent of its power is the amendment of matters of form, or the correction of clerical misprisions. Certainly it is without power, at the mere volition of the judge, without complaint from any party in interest, to set aside and annul a decree from which, by the lapse of time, an appeal is barred. *Ansley v. Robinson*, 16 Ala. 793; *Van Dyke v. State*, 22 Ala. 54; *Pettus v. McClanahan*, 52 Ala. 55; *Cameron v. McRoberts*, 3 Wheat. 591; *U. S. Bank v. Moss*, 6 How. U. S. 31; *Charman v. Charman*, 16 Vesey, 115; *Freeman on Judgments* § 100.

A rule *nisi* must be granted, requiring the chancellor to appear before this court on Thursday, April the 11th, 1878, and show cause why a peremptory *mandamus* should not issue, in accordance with the prayer of the petition.

[Castleman v. Jeffries.]

## Castleman v. Jeffries.

*Action by Wife, for Money Had and Received, belonging to her Statutory Separate Estate.*

1. *Wife's statutory separate estate ; statutory provisions apply to what.*—By the uniform decisions of this court, the various statutory provisions securing and regulating the separate estates of married women have been held applicable only to property which, in the absence of those statutes, would not be the separate property of the wife.

2. *Common law; presumption as to existence of, elsewhere.*—The presumption, in which the courts of this State indulge, as to the existence of the common law in other States having the same common origin, does not apply to Texas, whose origin was different.

3. *Conflict of laws as to rights of property, real and personal.*—Real property, as to its title, descent, and the forms necessary to be observed in its conveyance, is governed by the laws of the country in which it is situated ; but personal property follows the domicile of the owner.

4. *Foreign laws ; how administered here.*—The acknowledged rule of comity, which requires that full effect shall be given by our courts to foreign laws, when, by change of domicile, or removal of property, the legality of transactions had under those laws is brought before our tribunals, is always subject to the fundamental condition, that the foreign law does not contravene the positive law or public policy of our own State.

5. *Conversion of wife's lands into money, by sale.*—Where husband and wife are domiciled in Alabama, and lands belonging to the wife in Texas are voluntarily sold by them, the proceeds of sale being remitted to them here, the money is to be regarded as the acquisition of new property, and becomes a part of the wife's statutory separate estate.

6. *Husband's power to use and invest wife's money.*—As to money belonging to the corpus of the wife's statutory separate estate, the husband, as her trustee, has large discretionary powers of investment, and may lawfully use it in purchasing "articles of comfort and support of the household," such as her separate estate is by statute rendered liable for, or in payment of such articles already purchased.

7. *Creditor's right of retainer, as against wife, on account of family supplies furnished.*—A person who has received or collected money belonging to the corpus of the wife's statutory separate estate, under such circumstances as render him only liable to her for so much money had and received, may lawfully retain the amount due to him for necessary family supplies furnished by him to her and her husband, for which the statute renders her estate liable.

8. *Payment ; what evidence admissible under plea of, and what constitutes.*—In an action by the wife, suing alone, for money had and received, belonging to the corpus of her statutory separate estate, the defendant may show, under the plea of payment, that the money was collected by him on a check, or draft, which the husband had delivered to him on account of an indebtedness for "articles of comfort and support of the household" already supplied and furnished by him, and which was received and used by him as so much money: if the check was delivered and received as a payment, or if it was delivered pursuant to an agreement, made when the debt was contracted, that payment should be so made, it would constitute a payment.

9. *Set-off ; requisites of plea of.*—A plea of set-off requires the same averments which would be necessary to make a good complaint if the claim were sued on ; but it is not necessary that facts averred in the complaint should be repeated in the plea.

[Castleman v. Jeffries.]

APPEAL from the Circuit Court of Hale.

Tried before the Hon. GEO. H. CRAIG.

This action was brought by Mrs. Ann M. Jeffries, the wife of Walter B. Jeffries, against D. J. Castleman, to recover the sum of \$701.13, alleged to be "due by account for money had and received by Jeffries & Castleman (a firm composed of A. S. Jeffries and the said D. J. Castleman), belonging to the *corpus* of the statutory separate estate of the said Ann M. Jeffries, and received by said Jeffries & Castleman on the 18th November, 1872;" and was commenced on the 8th February, 1875. The defendant filed five pleas—namely: 1st, *non assumpsit*; 2d, payment; 3d, set-off; and the 4th and 5th as follows: 4. "That at the time the said summons was sued out, the said Walter B. Jeffries was indebted to him by account, to-wit, in the sum of \$1700, due to and made with the said firm of Jeffries & Castleman during the years 1870, 1871, 1872, 1873, due and payable on the first day of January next, for goods, wares, and merchandise sold by them; and defendant avers, that at the time said account was contracted, the said Walter B. Jeffries and Ann M. Jeffries were husband and wife, living in said county of Hale; and that said Ann M. Jeffries owned a statutory separate estate, of the money sued for in this action, at the time said account was contracted; and that said account was for articles of comfort and support of the household, suitable to the degree and condition in life of the family of said Walter B. and Ann M. Jeffries, for which the said Walter B. would be responsible in an action at common law, and for which said statutory separate estate of said Ann M. Jeffries was liable by statute; which said account defendant hereby offers to set off against plaintiff's said demand." 5. "That on the first day of January, 1870, defendant was merchandising in the town of Greensboro, Alabama, in partnership with the said A. S. Jeffries; and that the said Ann M. Jeffries, at or about that time, came to the store of this defendant, and told him, 'we,' meaning she and her family, would want to get some goods and groceries, and some money, that she would have some money coming to her soon, and that she wished to get the goods and groceries to be paid for out of said money; that defendant determined to let her have the goods and groceries she wanted, and did so; and that on, to-wit, about the first day of July, 1870, the said Walter B. Jeffries brought and delivered to this defendant, for Jeffries & Castleman, a certain draft for about \$300, payable to the said Walter B. Jeffries, and by him indorsed; that on said day, this defendant, for Jeffries & Castleman, took said draft for collection, and paid some money on account thereof to said Walter B.



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Jeffries; and that afterwards, to-wit, on or about the—day of —, the said Walter B. Jeffries came to the store of Jeffries & Castleman, with a draft for about \$300, payable to Ann M. Jeffries, and indorsed by said Walter B. and Ann M. Jeffries, which defendant knew, or understood to be, the money referred to in the conversation had with Mrs. Ann M. Jeffries; and that Jeffries & Castleman collected said last mentioned draft, and have, in pursuance of said understanding so had as aforesaid, before the commencement of this action, sold and delivered goods and *groceries*, and paid money to the said Walter B. Jeffries and Ann M. Jeffries largely more than the amount of both of said drafts. Wherefore, defendant says, that said debt is, and was at the time said suit was begun, fully paid and discharged.”

A demurrer having been sustained to the 5th plea, the defendant amended it, by leave of the court, by adding after the word “*groceries*,” as contained in the latter part of the plea, these words: “And that the goods so sold were articles of comfort and support of the household, suitable to the degree and condition in life of the family of said Ann M. and Walter B. Jeffries, and for which the husband, the said Walter B. Jeffries, would be responsible at common law, and that said W. B. Jeffries was and is insolvent.” To the plea as amended the plaintiff again demurred, and assigned the following as causes of demurrer: 1st, “that plaintiff is a married woman, and her action is for the recovery of the *corpus* of her statutory separate estate under the laws of Alabama, and the contract set up in said plea for the disposition of her estate is void under the laws of Alabama, and confers no right on the defendant in answer to plaintiff’s demand as set forth in her complaint;” 2d, “because said plea does not deny that the money or drafts, received by him, were the statutory separate estate of plaintiff, and the matters set forth in said plea do not show any sufficient answer to his liability to answer to the plaintiff for said statutory separate estate so received by him;” 3d, “that the action being in the name of the said Ann M. Jeffries, a married woman, and for the *corpus* of her statutory separate estate, the several matters therein set up are not good in answer to her complaint, either as a payment, or as a set off, or by virtue of the agreement or transaction set forth in said plea;” 4th, that a demand for goods for the comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, can only be enforced against the *corpus* of the wife’s statutory separate estate, by suit against the husband alone, or against the husband and wife.” The court

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sustained the demurrer, and issue was then joined on the 1st and 2d pleas. There was a demurrer to the 3d and 4th pleas, but the record does not show what disposition was made of it, nor does it show that issue was joined on either of those pleas.

By written agreement, entered into pursuant to the act approved March 6, 1875 (Code of 1876, §§ 3029-31), the cause was submitted to the court for decision, without the intervention of a jury; and the court was requested to make a special finding of the facts. The special finding of the court was as follows: "1. That the defendant was a member of the firm of Jeffries & Castleman, merchants in Greensboro, Ala.; which firm received two drafts, the first for \$299.38 in gold, dated Uniontown, Ala., July 25, 1870, payable to the order of W. B. Jeffries, drawn by Bush Jones on T. P. Miller & Co. of Mobile, Ala., upon which they received, according to the testimony of the defendant, the sum of \$59.87 premium, in United States currency; and the second dated August 18, 1870, for \$294.72, payable to Ann M. Jeffries, on and by the same persons as the first, on which they received, in United States currency, the sum of \$47.15 premium. The first draft thus amounted, in United States currency, to \$359.25, received by them July 26th, 1870; and the second amounted, in the same currency, to \$341.87, and was received by them August 22d, 1870. 2. That such money was the proceeds of certain lands in the State of Texas, which descended from the father of plaintiff, to plaintiff and two sisters; that said lands were there sold, by consent of said heirs, for distribution, and the proceeds of plaintiff's share of said land remitted by the above drafts to her, through the above-mentioned drawer. 3. That the proceeds of said drafts constituted the *corpus* of plaintiff's separate estate as a married woman, under the statutes of Alabama. 4. That said drafts were deposited with the firm of Jeffries & Castleman, of which firm the defendant was a member, for collection. 5. That the sum of \$130.60, of said proceeds of said drafts, was paid by defendant to plaintiff and her husband; which, on the 18th November, 1872, would leave a balance of \$570.52, of said proceeds of said drafts, as due to plaintiff. 6. That the said firm had notice of the character of the funds arising from said drafts. 7. That the plaintiff, before the commencement of this suit, demanded payment of said money of said defendant. 8. That the account offered in evidence by the defendant was kept with and made against Walter B. Jeffries, plaintiff's husband. 9. That, under the pleadings and previous rulings of the court in the case, there was no legal and valid transfer or conveyance of said *corpus* of said statutory separate



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estate; and the question of the character of the goods furnished, so as to charge said separate estate therewith, does not arise; and the testimony thereon is irrelevant and inadmissible, and is therefore excluded. 10. That the legal interest on said sum of \$570.52, from the 18th November, 1872, to this time, should be allowed, amounting to \$134.42, which, with the said principal, amounts to \$704.94; which sum, it is ordered, that the plaintiff do have and recover of the said defendant, together with the costs, for which execution may issue."

The bill of exceptions purports to set out all the evidence adduced on the trial, and states that Mrs. Jeffries, the plaintiff, testified on her own behalf as follows: "That she is the wife of W. B. Jeffries, and resides with her said husband, in said county of Hale, where she also resided in 1870; that she owned an estate of about \$1,200, which came to her as one of the heirs of her father, the late W. M. Murphy, who died in Alabama in 1858; that it consisted of money, the proceeds of lands in Texas which belonged to her said father, and were there sold, in the spring of 1870, by consent of herself and her two sisters, who were jointly interested therein; that her husband employed Judge Bush Jones, of Uniontown, Ala., to attend to the collection and receiving of her share of the land; that Judge Jones did so, and the money was remitted to him from Texas, and he remitted it in the form of the drafts on T. P. Miller & Co.," which were produced. "Plaintiff stated, also, that these drafts were carried by her husband to said Jeffries & Castleman, for collection, and they realized and received, of principal and premium, about \$700, in July, or August, 1870; that she applied to the said defendant, soon after the collection of the last draft, for the money, as she had an opportunity to lend it out on advantageous terms; that defendant said, in reply, he regretted exceedingly not being able to pay her, as he had used the money to pay freight on goods, and in his business; that she afterwards applied to him for money, and received from him about \$30: that she never consented, or agreed, to apply her money to the payment of goods and provisions bought either by her husband or herself; and that she did get and buy goods and provisions at the defendant's said store, in her own person, and on orders written by her." Being cross-examined in reference to the account of Jeffries & Castleman against Walter B. Jeffries, hereinafter mentioned, she specified some of the items as "articles suitable and necessary for herself and family;" but this evidence, "as to the character of the goods—whether they were articles of comfort and support, suitable to the degree and con-



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dition in life of the family of plaintiff and said W. B. Jeffries"—the court excluded and rejected, on motion of plaintiff, on the ground that it was irrelevant; to which ruling the defendant reserved an exception. "Plaintiff stated, also, that there were other articles of a similar nature in said account, which she had herself purchased, during the years 1870, 1871, 1872, after her money was in the defendant's hands as above stated; that she did not agree, or intend, to apply or use her money in paying for the goods so bought by her or her husband; that she did not remember having any conversation with the defendant, about the beginning of the year 1870, when she bought the first bill of goods, but did have a conversation with said A. S. Jeffries, who was her husband's uncle, down at his house, about opening said account, before she went up to the store; also, that her husband, said Walter B. Jeffries, was insolvent at the date of these transactions, and is so now; that he farmed in partnership with one H. T. Waller in 1870, and with J. C. Nelson in 1871, and with said A. S. Jeffries in 1872."

"The defendant testified that, on or about the 1st January, 1870, he had a conversation with plaintiff in the store of Jeffries & Castleman; that she said to him: 'We will have some money coming before long, and we want to get some goods and groceries, and when the money comes, it will be placed in your hands; and we want some money, but not very much.' Witness said, that upon the faith of the representations about the money he then let plaintiff get the goods and articles charged under date of January 8, 1870, and others afterwards; that on or about the 26th July, 1870, said Walter B. Jeffries came in, and brought the following draft,"—the first draft above described, "which witness understood to be for some of the money referred to in his said conversation with plaintiff; that he forwarded said draft to his correspondent in Mobile for collection, and received on it \$59 premium, said draft being payable in gold; that on the day he received said draft from Jeffries, he let said Jeffries have \$40 in currency on account thereof; that afterwards, on or about the 20th August, 1870, said Jeffries again came, and brought to him the following draft," namely, the second draft above described; "that he collected on this draft \$47.15 premium, making the total amount received by him on both drafts \$701.12; that he never knew, or had any intimation, that said money belonged to plaintiff, until after the whole amount of both drafts had been paid to plaintiff and her husband, in money and goods; that after the receipt of said first draft he paid money to plaintiff, and also to her said husband at times, out of the money so collected, as

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entered on the account, which was kept against said Walter B. Jeffries; that he furnished goods and groceries to plaintiff and her said husband, between 8th January and July 26th, 1870, on the faith of the money to come, amounting to \$202.92; that plaintiff and her husband, after said draft came to hand, received money, and bought goods and groceries from him, which were furnished by him in payment of the money so received, then in his hands; that he would not have sold goods to said Walter B. Jeffries on credit; that as long as any of the proceeds of said drafts remained in his hands, no goods or groceries were sold on a credit, but were sold for the money in hand; that he did sell goods to plaintiff and her husband on a credit, after the proceeds of said drafts were thus exhausted, on the expectation that said A. S. Jeffries, his partner, would assume and pay the debt, but he refused to do so, and only paid or assumed \$166 of the amount thus sold. Said witness testified, also, that plaintiff did call on him for some money, perhaps once or twice, but not for any large amount; that he did not refuse to pay her, but deferred her, and paid her in a short time the small sums called for; that she never did demand the whole of said money of him at any one time, or at all, until the bringing of this suit; and that he never refused to let her have money, when she called for it, until after she and her husband had received from him, in money and goods, all that he had received on said drafts. He further testified, that he furnished and paid to plaintiff and her husband, in money and goods, between 8th January and 20th August, 1870, \$437.76, of which sum \$234.84 was furnished and paid to them after he received the first draft, and before he received the second; that plaintiff had received and bought from him in her own person, during the years 1870, 1871, 1872, in goods and money, not including her written orders, \$958.87, and including her orders \$1,110; that he had paid her and her husband \$130.60, not including any orders for cash, and had paid cash to other persons, on their orders, \$61.15; and he then produced a bundle of orders written by plaintiff," some of which are copied into the bill of exceptions. These orders the court excluded, on motion of the plaintiff, on the ground that they were irrelevant; to which ruling the defendant excepted. The defendant also produced the account of Jeffries & Castleman against said Walter B. Jeffries, amounting in the whole to \$1,747.35, the balance still due and unpaid being above \$500, and testified to its correctness; and he further testified, "that said Walter B. Jeffries had full knowledge of the payment of the money arising from said drafts, by the purchases of goods and receipt of money, and

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assented to and ratified it ; that he also talked with plaintiff, after the dissolution of the firm of Jeffries & Castleman, about said unpaid balance of \$500, and she expressed her regrets at their not being able to pay it, and their full intention to do so as soon as they were able ; also, that neither plaintiff nor her husband ever raised any objection to the manner of settlement of said account for the money arising from said drafts ; also, that when he received the second draft, payable to plaintiff, he presumed that it was her money, and also presumed that the first draft came from the same source ; and he explained that he meant he supposed it was all a part and parcel of the same money to which plaintiff had referred in her first conversation with him, as above stated."

H. Witherspoon, who was a clerk in the store of Jeffries & Castleman during the years 1870-72, testified to the correctness of the account against said Walter B. Jeffries ; also, "that on one occasion, during that time, plaintiff said to him, while buying goods at the store, that they ought to sell Walter, meaning her husband, goods at cash prices, as he had money on deposit there to pay for them ; and that the goods sold to plaintiff and her husband were, to the best of his recollection, sold at marked prices." The plaintiff testified, "in rebuttal, that the money of which she spoke to said Witherspoon, on which she thought she should get goods at cash prices, was for a bale of cotton which they had sold for her, and which is not claimed in this action ; also, that she got Jeffries & Castleman to buy a bill of goods for her in New York, for which she paid them \$18.25 in 1870, and paid the balance to said A. S. Jeffries ; that she informed said A. S. Jeffries of expecting to receive said money from the Texas lands, and that she wished to use it in the purchase of a home for herself and her children ; and that she told him this after said drafts were placed with said firm for collection ;" and she further testified, that her husband had never had a settlement of his partnership business in planting with said A. S. Jeffries, and had always supposed, until after the dissolution of the firm of Jeffries & Castleman, that said A. S. Jeffries had paid the account introduced in evidence by the defendant.

The several rulings of the court on the pleadings and evidence, as above stated, the special finding of the court, and the judgment thereon, are now assigned as error.

JAMES E. WEBB, and THOS. H. WATTS, for appellant.

SMITHS & ROULHAC, *contra*.

STONE, J.—"All property of the wife, held by her previous to the marriage, or which she may become entitled to



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after the marriage, in any manner, is the separate estate of the wife," . . . —Code of 1876, § 2705. Under this statute, and all sections of the Code bearing on the same subject, we have uniformly held, that the provisions therein found relate exclusively to estates which, in the absence of the statute, would not be the separate property of the wife. 2 Brick. Dig. 91, § 272. The statute has never been construed as affecting rights of property which had vested prior to its enactment, or choses in action of the wife, when both the ownership and the marriage antedated the enactment of the statute.—*Ib.* §§ 268, 269, 270, 276.

2. In the present case, lands descended to the plaintiff and her sisters. The lands were in the State of Texas, and were sold for partition; and the share of plaintiff came to her in money, the proceeds of the lands. Plaintiff, so far as we are informed, has all the while been a resident of Alabama. She surely was when she received the money. The question arises, what are the several rights of wife and husband in the money? No proof was made of the laws of Texas bearing on this question. If Texas had had a common origin with this and the other older States, we would presume the common law prevails there.—1 Brick. Dig. 349, § 9. But Texas did not have a common origin with these older States, as to which this presumption is indulged. Hence, we are left without proof, and without presumption, as to what are the laws of Texas which govern the transmission of property, and the effect of marriage upon its title and enjoyment.

3. An examination of the various statutes will show, that scarcely any two States have similar statutes on the subject we are considering. Immoveable, or real property, is governed by the law of the country in which it is situated, as to its title, descent, and the forms necessary to be observed in its conveyance.—*Nelson v. Goree*, 34 Ala. 563. The rule is different as to personal property.—*Turner v. Fenner*, 19 Ala. 355.

As we have said above, the plaintiff and her husband are residents of this State; they were probably married in this State; and it follows, that the laws of no foreign State have stamped their impress on any personal property belonging to either, which can follow and attach to it in this State.—*Drake v. Glover*, 30 Ala. 382. Personal property, as to ownership and transmission, is governed by the law of the domicile of the owner.—*Nelson v. Goree*, *supra*; Wharton's Conf. of Laws, § 297. If we were to apply to the products of property, having its *situs* in another State, yet owned by persons domiciled in this, and who bring such products into this State, the laws which governed the property in the State

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from which the products were brought, we should soon find ourselves involved in confusion, of which the shrewdest can scarcely conceive. It is not beyond the pale of possibility, that one and the same person may own lands in several different States, in one of which the common law prevails, in a second the civil law, and in others various modifications of statutory systems, which secure to married women the separate ownership of their property. In the several landed interests thus situated, the owner, being a married woman, and having her domicile in this State, would have very variant rights, and her powers of alienation and enjoyment might be equally variant. Now, let these lands be converted into money, and the money brought into Alabama, the domicile of the wife; how could the character of estate, which local law had impressed upon the land, follow the money into this State, and stamp its characteristics upon it? Money has no earmark, and the profession will readily understand into what inexplicable confusion such holding would lead.

4. We take another step. While we accord to other States plenary legislative sovereignty in the matter of making and enforcing contracts, and of acquiring, enjoying, and disposing of property within their territorial jurisdictions, and will give full effect, as a rule, to their laws, when, by change of domicile, or removal of property, the legality of transactions there is brought before our tribunals; yet, this comity of nations must be taken and administered with the fundamental condition, that such foreign law does not contravene the positive law, or public policy of our own State.—*Hanrick v. Andrews*, 9 Por. 9; *Newcombe v. Leavitt*, 22 Ala. 631.

5. Influenced by the fact that real estate, voluntarily converted into personalty, can not, even when the two species of property are owned and held in the same jurisdiction, be enjoyed and disposed of under one and the same system of rules, it has been held, where the common law defines the property-rights springing out of the marital relation, that "where a wife joins her husband in the sale of her real estate, without an agreement in reference to the proceeds of sale, the proceeds vest absolutely in the husband."—*Chester v. Greer*, 5 Humph. 26; *Martin v. Martin*, 1 Comst. 473; *Benedict v. Montgomery*, 7 Watts & Serg. 238. This results from certain rules of the common law, namely: that the rights and interests of the husband in the wife's realty are inadapated to the use and enjoyment of money; and the absolute ownership which the law gives to the husband, when he reduces to possession the wife's personal property, including her moneys, is incompatible with the temporary seizin which the same common law gives to him in her realty. The con-

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version of the property from realty to personalty, necessarily takes it from under one system of rules; and when effected voluntarily, and without any settlement or contract defining its future use, the law alone operates upon it, and declares its *status*. What law? On principle, it would seem it ought to be the law then in force, and not an exploded, or superseded system. So, in *Sessions v. Sessions*, 33 Ala. 522, where the marriage took place prior to the enactment of the statutes securing to married women their separate estates, the wife being at the time seized of real estate; and after the enactment of those statutes, the husband and wife sold the lands, and converted them into money; it was held, that the proceeds were thereby converted into new property, and they became the separate estate of the wife under the statute. A similar principle was declared in *Sampley v. Watson*, 43 Ala. 377.—See Whar. Conf. Laws, § 198.

To avoid the embarrassments attending any other rule, we feel it our duty, in cases like the present, to follow the lead of *Sessions v. Sessions*, *supra*, and hold that money, thus received, must be regarded and treated as the acquisition of *new property*, governed by the laws of this State, which define the several rights of husband and wife in such newly acquired property; the law in force at the time of the new acquisition.

6. We think no importance should be attached to the fact that checks, instead of money, were paid by Jeffries to appellant. Commercial payments are most generally made in checks; and we shall treat this case as if cash had been handed by Jeffries to Castleman.—*Stewart v. Connor*, 9 Ala. 803. Saying nothing, then, about the alleged agreement between Mrs. Jeffries and Castleman, by which it is averred, though somewhat denied, that the former obtained the credit on the faith of her expected remittance from Texas, and on her promise to pay the account when the remittance should come to hand, we have this simple state of facts: Castleman had in his hands seven hundred dollars in money, of the *corpus* of Mrs. Jeffries' statutory separate estate, and there appears to have been due to him a much larger sum, on contracts, largely made by Mrs. Jeffries herself, "for articles of comfort and support of the household, \* \* \* suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law." The case may be justly stated even stronger than this. The testimony tends to show that Jeffries, the husband, actually paid, or turned over to Castleman, the money, or checks, which the present suit seeks to recover from him.

The money in controversy in the present suit, when it was realized by Mrs. Jeffries, vested in her husband as her trustee,



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who had the right to manage and control the same.—Code of 1876, § 2706. In *Marks v. Coucles*, 53 Ala. 499, this court, commenting on section 2709 (Code of 1876), said: “The statute is silent as to money, the *corpus* of the wife’s separate estate, not the subject of alienation, but the subject of conversion into other property, or of investment, unless it is derived from a sale of other property.” The court then proceeded to declare, that of this money, *corpus* of her estate, which was not proceeds of her property which had been sold, the husband was trustee, with large powers of investment, and that without any direction or decree of the chancellor authorizing such investment. We do not doubt the power of the husband to invest moneys, the *corpus* of the wife’s separate estate, in the purchase of articles of comfort and support of the household, or to employ them in payment of those previously purchased, if they fall within the classes for which they are declared to be liable under section 2711, Code of 1876.

7. Nor do we doubt that a creditor, who is in possession of moneys of the wife, which he holds in such manner as to constitute him only a debtor to her, as so much money had and received for her use, may retain such money in payment of any just demand he has, which, by said section, is made a charge on her statutory separate estate; and, if sued by her for such money, he can successfully defend on that ground. To hold otherwise, would be to declare that a *feme covert*, owner of a statutory separate estate, could successfully maintain a suit for the money, when, at the same time, the creditor could successfully prosecute a suit against the *corpus* of her estate, for the same, or larger amount. The law abhors circuitry of action, and will adjust cross demands between parties, whenever it can do so consistently with its rules of procedure. The action for money had and received is an equitable action, and can not be maintained when the defendant can show that, *ex æquo et bono*, he is authorized to retain the money alleged to be in his hands.—1 Brick. Dig. 140, §§ 72, 73; *Ib.* 142, § 106.

8-9. The defense in the present action assumes two forms. First, it is alleged that, in consideration of “articles of comfort and support of the household,” &c., furnished and to be furnished by Castleman to Jeffries and wife, Jeffries, the husband and trustee, turned over and paid to Castleman the two checks, which were received and used as so much money. If this be so, and if such articles were furnished in value equal to, or greater than, the sum of the two checks and the premium thereon, then this is a complete defense to the action, and could be given in evidence under the general plea

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of payment. The second form of defense is set-off. Set-off, being in its nature a cross action, or revocatory suit, must be pleaded with the same formality which would be required in a complaint, if it were made the cause of an action brought. See *Ravisies v. Stoddard*, 32 Ala. 599.

The fifth plea, as amended, is scarcely a good plea of payment. The delivery of the checks by Mr. Jeffries did not necessarily, and *per se*, constitute such delivery a payment, unless something was done or said, at the time, showing that they were delivered as payment. Coupled with the agreement that payment would be so made, alleged by Castleman to have been entered into when the account was opened, if it be true that such agreement was made, the delivery by Jeffries, even if silently done, would amount to payment pursuant to the agreement. The averment in that plea, referring to the delivery of the checks by Jeffries, is in the following language: "which defendant knew, or understood to be, the money referred to in the conversation had with Mrs. Ann M. Jeffries." This is not equivalent to an averment that it was the money referred to by her. This averment is bad. The plea should aver, positively, that it was the money referred to in the conversation; or, it should aver that it was delivered by Jeffries in payment. In either form, it would be a good special plea of payment.

But this plea has some averments which tend to show it was intended as a plea of set-off. As such plea, it was not necessary it should aver the money sued for was of the statutory separate estate of Mrs. Jeffries. That had been averred in the complaint. As a plea of set-off, however, it is defective in this: it fails to aver that Mrs. Jeffries owned such statutory separate estate before July, 1870, and claims as a set-off some items of account sold and delivered to her before that time. The plea is to the whole action, and does not show how much of the account was contracted after the land was converted into money, and thereby became her statutory separate estate. It is perfectly consistent with every averment in the plea, that the bulk of the account was contracted before she acquired any separate estate, which, under the rules we have declared, would be brought under the dominion of our statutes. As soon as the land became money by conversion, the money, no matter where situated, became the statutory separate estate of Mrs. Jeffries, whose domicile was in Alabama. Only the separate estate owned by Mrs. Jeffries at the time the goods were purchased, can, under this branch of the defense, be condemned to the payment of the debt thereby created.—*Ravisies v. Stoddard*, su-

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*pra*; 2 Brick. Dig. 96, § 342. As a plea of set-off, the fifth plea is bad, for the reason above stated.

The husband being trustee of the fund in controversy, any payment of the money made by Castleman to him, was admissible under the plea of payment, and was a good defense *pro tanto*. So, if Jeffries delivered the checks in payment, or pursuant to the alleged agreement that the account contracted should be so paid, then any articles of comfort and support of the household, furnished by Castleman, which were suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, would be referred to such agreement; and, to the extent of such purchases after she became the owner of the alleged statutory separate estate, they are a defense to the present action. The Circuit Court erred in not receiving evidence on these several points, even though the fifth plea was rightly adjudged bad on demurrer. And if the fifth plea be amended as above indicated, so as to make it a good plea of set-off, the evidence should be received in defense, notwithstanding it may not be shown the checks were delivered in payment, or pursuant to the alleged agreement of Mrs. Jeffries.

Lest we be misunderstood, we will add, by way of explanation, that if Jeffries delivered the checks as payment, under either of the hypotheses stated above, then such payment may be applied to the purchases made before Mrs. Jeffries' lands became statutory separate estate by being converted into money, as well as to purchases afterwards made.

It results from what we have said, that the judgment of the Circuit Court must be reversed, and the cause must be remanded.—*Tenn. & Coosa Railroad Co. v. Moore*, 36 Ala. 371, 391.

Reversed and remanded.



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*Trial of Right of Property in Bales of Cotton, between Landlord as Plaintiff in Attachment, and Mortgagee for Advances.*

1. *Sufficiency of mortgage, in description of property conveyed.*—A mortgage, or instrument purporting to create a statutory lien for advances to make a crop, which describes the property as “my entire crop of cotton and corn of the present year,” without any other descriptive words, is not void for uncertainty and indefiniteness, but may be rendered sufficiently certain and definite by extrinsic proof.

2. *Landlord's statutory lien for rent.*—A landlord's lien on the crop of his tenant, for the rent of the leased premises, is created by the statute (Code of 1876, § 3467), and not by the issue or levy of an attachment, which is only given as a remedy for enforcing that lien.

3. *Attachment for rent.*—An attachment for rent, at the suit of the landlord, should be issued against the tenant's crop only, and not against his estate generally; but, if issued against his estate generally, though it would be abated on plea, it is only irregular, and not absolutely void, and may properly be levied on his crop.

4. *What defects are not available to claimant.*—On the trial of a statutory claim suit, the claimant can not take advantage of defects in the attachment, or other process, which do not render it absolutely void.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. W. S. MUDD.

The appellant in this case, Richard F. Ellis, sued out an attachment on the 5th January, 1876, against E. C. Ellis, his son, claiming the sum of \$153 as due to him for the rent of land, known as the “Sipsey place,” for the year 1875; the attachment being sued out on the ground “that the said E. C. Ellis, the tenant of the said R. F. Ellis, has removed a portion of the crop from the said tract of land.” The attachment was issued by the clerk of the Circuit Court, and commanded the sheriff “to attach so much of the estate of the said E. C. Ellis as will be sufficient to satisfy the said debt and costs.” It was levied by the sheriff on three bales of cotton, to which a claim was interposed by Caswell Martin, the appellee, who made affidavit of his ownership, and gave bond, as required by the statute; and an issue was thereupon made up, under the direction of the court, between him and the plaintiff in attachment, to try the right of property in the cotton. On the trial of this issue, as the bill of exceptions states, “the following proceedings were had”:

“The plaintiff introduced several witnesses, who proved that he rented to his son, said E. C. Ellis, for and during the year

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1875, a small tract of land in said county, known as the 'Sipsey place'; that the said E. C. Ellis, on the 31st December, 1874, executed the following note for the rent," setting out a note for \$153, dated the 31st December, 1874, and payable on or before the 1st January, 1876: "that seven bales of cotton, more or less, were raised by said defendant on said farm during the year 1875, three of which bales are the bales now in controversy, on which the attachment in this case was levied, and which were claimed by said Caswell Martin; and the proof tended to show, also, that all of said seven bales of cotton were removed from the premises, to the gin-house of one Taylor, to be by him ginned and baled, in December, 1875. The claimant offered in evidence the following mortgage, or lien-note, and proved its execution by said E. C. Ellis on the 27th May, 1875, and that it was intended to cover the crops of cotton and corn raised by him on the 'Sipsey place' during the year 1875, which include the three bales of cotton here in controversy, and in fact the whole of the said seven bales. This proof was made, and said instrument introduced, against the objection of said plaintiff, who objected thereto on the ground that said instrument contained no sufficiently certain description of the property or crop alleged to be conveyed or described, and was void for uncertainty as against the plaintiff, and could not be lawfully explained by parol evidence. The court overruled the objection, and admitted said deed as evidence, with proof that the cotton was part of the crop raised by said E. C. Ellis on said place in 1875; to which ruling plaintiff excepted."

The said mortgage was in these words: "The State of Alabama, Pickens county: On the 1st day of December next, I promise to pay C. Martin, or order, the sum of five hundred dollars, cash advanced by him to me, and obtained by me this day *bona fide*, for the purpose of making a crop the present year; and without such advance it would not be in my power to procure the necessary teams, provisions, and farming implements to make such crop; and this note is given as a lien on my said crop, under the statute, with power to take possession of and sell the same when said debt becomes due, on account thereof, at such time and place, and on such terms as he may deem best, if I fail to pay the same when due. And I obligate myself to deliver to said C. Martin, or order, at such place as he may designate, my entire crop of cotton and corn of the present year, as soon as ready for market; to be by him sold, in such manner as he may deem best, on account of said rent. Witness my hand and seal, this 27th May, 1875." This instrument

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was signed by said E. C. Ellis, attested by two subscribing witnesses, and admitted to record in the office of the probate judge of Tuscaloosa, on the 9th June, 1875, on proof by one of the subscribing witnesses.

The bill of exceptions proceeds as follows: "The consideration of said obligation was mostly, to-wit, \$350 of the \$500, for advances made said E. C. Ellis to enable him to cultivate said crop during the year 1875; and the balance of said consideration, to-wit, \$150, was an antecedent debt of the year previous. The proof was conflicting, as to whether or not said E. C. Ellis had told said claimant, at or before the time said instrument was executed, that plaintiff was to charge him no rent on said place; but it was proved that said claimant, when he took said mortgage or instrument, and also when he seized the cotton under it, knew that said E. C. Ellis did not own said place which he cultivated during the year 1875, but that said plaintiff owned it. It was shown in evidence, also, that said claimant sent to Taylor's gin-house, and took possession of said seven bales of cotton, under said mortgage or lien-note, without the consent of plaintiff or defendant; and the proof showed that said cotton averaged nearly five hundred pounds per bale, and was worth eleven to twelve cents per pound."

"This was all the evidence; whereupon, the court charged the jury, among other things, as follows: '1. That an attachment, sued out by a landlord for rent of land, may be levied on the crop raised on the rented premises, whether in the possession of the tenant, or any one holding it in his right, or in the possession of a purchaser from him with notice of the landlord's lien.' '2. But, in such case, the writ of attachment must be to attach so much of the *crops* raised or made on the rented land, and not so much of the *estate of the defendant* as will be of value sufficient to satisfy the debt and costs: that an attachment, like the one in this case, issued against the estate of the defendant, even though the same be levied on a portion of the crops raised on the rented land during the current year, and though the affidavit be correctly framed, creates no such lien on such crop or crops as would have priority over the mortgage lien of the claimant.' '3. That if the jury believe the said mortgage was executed by E. C. Ellis to the claimant on the 27th May, 1875, and was intended to include and did include the crops raised by said E. C. Ellis on the Sipsey place in the year 1875; even though they should further believe that the debt sued for was due for rent of said place by defendant as plaintiff's tenant during said year, and that the cotton in controversy was raised on said rented premises during said year, and so



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known to said claimant; still, the plaintiff, though a landlord, would have no such claim or lien, under the present writ of attachment, as would be superior or paramount to the claim or lien of said claimant under his mortgage, but that the lien of the mortgage would be superior to the lien of the attachment, or any claim thereunder in this case.' ”

The plaintiff excepted to the second and third charges; and he now assigns them as error, with the rulings of the court on the evidence, to which, as above stated, he reserved exceptions.

S. A. M. WOOD, and H. M. SOMERVILLE, for appellant.—

1. It may be conceded that the usual and more proper form of an attachment, in such a case as this, would direct a levy to be made of the crop raised on the rented premises, and not of the defendant's estate generally. But the mistake in form is a mere clerical misprision—an irregularity, of which the defendant in attachment could only take advantage by plea in abatement, or motion to quash. He was the only person who could be damaged by the exercise of the enlarged power which the writ conferred on the sheriff, and he has waived the objection. There was nothing wrong or irregular in the levy of the attachment, and the claimant can not avail himself of irregularities which the defendant in the attachment has waived.—Drake on Attachments, § 697; 1 Brickell's Digest, 165, § 155, and cases there cited; *Pace v. Lee*, 49 Ala. 571; *Ware v. Todd*, 1 Ala. 199; *Blair v. Miller*, 42 Ala. 308; *Bank v. Andrews*, 8 Porter, 404. Besides, a landlord's lien is created by the statute, and not by the levy of an attachment; and an attachment is only given as a remedy, or means of enforcing the lien.—*Westmoreland v. Foster*, at the present term.

2. The claimant's mortgage purports to convey the grantor's "entire crop of cotton and corn of the present year"; but it entirely fails to indicate where the crop was to be raised, to whom the land belonged, in what county it was situated, or whether it contained ten acres or a thousand. As between the immediate parties, where no intervening rights have accrued to third persons, the defect may be susceptible of explanation, as a patent ambiguity, or simple inaccuracy of description; but, as against attaching creditors, or purchasers for value, the instrument itself ought to contain descriptive words sufficiently certain and definite to identify the property, else it is void for uncertainty.—*Jackson v. Rosevelt*, 13 John. 96; *Nolte v. Libbert*, 34 Indiana, 163.

VAN HOOSE & POWELL, *contra*.—1. The attachment should

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have been issued against the crop raised on the rented lands, and not against the defendant's estate generally.—*Hawkins v. Gill*, 6 Ala. 620. This defect is not a mere irregularity, or clerical misprision: it is a defect in substance, and renders the attachment void, as an attachment for rent.—*Drake on Attachments*, § 4 *a*. The act of the clerk, in issuing an attachment, is judicial, and not ministerial.—*Ex parte Harris*, 52 Ala. 91; *Matthews v. Sands & Co.*, 29 Ala. 138; 27 Ala. 362.

2. If the plaintiff's attachment was void, there can be no doubt of the claimant's right to take advantage of the defect. The cases cited for appellant, as to defects of form which the defendant in attachment must plead in abatement, and of which the claimant can not take advantage, were ordinary attachments, sued out under the general law; while this is a special proceeding, in which the statute must be strictly pursued, and to which the rules governing ordinary attachments do not apply. The claimant could not litigate the plaintiff's right to a general attachment, or to a judgment against the defendant; but, as a privy in estate and interest, having possession of the property attached, he may question the plaintiff's right to seize and condemn it. As between them, the question is, which has the superior title—the claimant, as a mortgagee in possession after the law-day, or the plaintiff as a general attaching creditor.—*Collingsworth v. Horn*, 4 Stew. & P. 249.

3. As to the sufficiency of the claimant's mortgage in the description of the property, see *Gafford v. Stearns*, at the last term.

BRICKELL, C. J.—The description of the thing conveyed in the mortgage is very general and indefinite; but it is capable of being rendered certain, by evidence showing the lands cultivated by the mortgagor in 1875, and the quantity of corn and cotton raised thereon. Generality and indefiniteness of description will not avoid a conveyance. It is uncertainty that will not be removed when the conveyance is read in the light of the circumstances surrounding the parties at the time it was entered into, and their manifest design is considered. Nor can it be admitted that the necessary effect of the generality of the description is to mislead and deceive strangers dealing with the mortgagor. If purchasing from him corn or cotton, inquiry is excited, and they are bound to ascertain, and must at their peril ascertain, whether it was raised by the mortgagor in 1875, or whether it was in some other manner acquired.

The lien of the landlord for the payment of rent, is an in-

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ident of the tenancy, attached by law. It is not created by, or dependent on, the issue and levy of an attachment on the crops. This is but the mode of enforcing the lien at law. The attachment should direct a levy on the crops only, and should not be an authority to the officer executing it, to levy on the estate generally of the tenant.—*Hawkins v. Gill*, 6 Ala. 620. If issued against the estate generally, it would be abated on plea, and a levy on other property than the crops grown on the rented premises would be set aside. But it is not void—it is merely irregular; and until abated, if levied on the crops, is capable of enforcing the lien for rent. A claimant, in a trial of the right of property, can not take advantage of irregularities in the process levied, which do not render it void.

The instructions of the Circuit Court were inconsistent with these views; and its judgment is reversed, and the cause remanded.

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### *Bill in Equity by Administrator, for Settlement of Decedent's Estate.*

1. *Settlement of administrator's accounts, at suit of administrator de bonis non.* An administrator *de bonis non*, having cited his predecessor to a settlement in the Probate Court, can not afterwards have the settlement transferred to the Chancery Court, under a bill filed by him for a settlement of his own administration.

2. *Probate decree ordering sale of lands for payment of debts.*—A probate decree, ordering lands to be sold for the payment of debts by an administrator, ought to specify whether the sale should be for cash, or on credit; but the failure to so specify makes it, in effect, an order to sell for cash, and does not affect its validity.

3. *Same; widow's claim of dower in such lands.*—When lands are sold by an administrator, under a probate decree for the payment of debts; and the purchasers, by agreement with the widow, pay her a compensation in money for her claim to dower in the lands; they are not entitled to an abatement of the purchase-money, to the extent of the sum so paid, nor is their claim of the right to such abatement any obstacle to a resale of the lands at their risk.

4. *Parol agreement contradicting judgment.*—An administrator, having allowed creditors to obtain judgments at law against him, can not obtain equitable relief against such judgments, on an averment that they were rendered upon "an agreement and understanding that no effort was to be made to charge him personally, or to charge the sureties upon his bond, with the amount of such judgments."

5. *Bill of conformity by administrator; when does not lie.*—An administrator can not maintain a bill of conformity against the creditors of the estate, who have obtained judgments at law against him, on the ground that the estate has become insolvent by reason of the depreciation in the value of property gen-

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|----|-----|
| 60 | 399 |
| 63 | 22  |
| 65 | 248 |
| 66 | 306 |
| 66 | 314 |
| 72 | 479 |
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erally, when it appears that, if he had exercised due diligence in the administration, the debts might have been paid before any depreciation occurred.

6. *Settlement of decedent's estate; when removed into equity.*—The distributees of a decedent's estate may, at any time before proceedings for a settlement have been commenced in the Probate Court, remove the settlement into the Chancery Court, without the assignment of any special reason; but the administrator can not file a bill for that purpose, without showing the existence of some special reason for the interposition of a court of equity; and the involved and complicated condition of the affairs of the estate, when caused by his own neglect and breach of duty, is not a sufficient reason to support such a bill.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. HENRY C. SPEAKE.

The bill in this case was filed on the 30th March, 1877, by F. L. Hammond, as the administrator *de bonis non* of the estate of John Gurley, deceased, against Frank B. Gurley, the administrator in chief, Mrs. Rebecca Gurley, the widow, and the several children of said decedent, as his heirs-at-law and distributees; and also against Ellen M. Weakley, Sallie P. Sale, as the executrix of the last will and testament of Charles C. Sale, her deceased husband, and several other persons, as creditors of said estate. Its material allegations, so far as necessary to a correct understanding of the points here decided, are stated in the opinion of the court. The prayer of the bill was in these words: "Your orator prays, that this honorable court will take jurisdiction of the settlement of the estate of said John Gurley, deceased; that, to that end, an account may be stated between said Frank B. Gurley and said estate, to finally settle his said administration; and that an account may be taken between your orator and said estate, to finally settle his administration upon said estate; and that an order and decree of this court" [may be made], requiring the register of this court to sell all the real estate now belonging to the estate of said John Gurley, deceased, on such terms as the court may direct, and execute titles to the purchasers, and to put them in possession of the lands so sold; and that the proceeds of the sale of such lands be paid into this court, to be administered under its direction. And your orator prays, that each of the said defendants be enjoined from proceeding in the Probate Court of Madison against your orator, for the settlement of the estate of said John Gurley, deceased. Your orator further prays, that the said Ellen M. Weakley, Sallie P. Sale, as the executrix of Charles C. Sale, and Elias B. Spragins, as administrator of Elias C. Spragins, deceased, be each enjoined from further prosecuting or collecting, or endeavoring to further prosecute or collect, any claim or claims which they may have or hold against the estate of said John Gurley, in any other court than the Chancery Court of this, the 5th district;

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and that the said Ellen M. Weakley be enjoined and restrained from further prosecuting a certain suit, pending in the Circuit Court of Madison county, Alabama, against your orator, and against Daniel B. Turner and Thomas W. Martin, as sureties on your orator's bond as administrator of said John Gurley's estate, wherein said Ellen M. Weakley claims of your orator one thousand dollars. And your orator prays for all other relief, general and special, to which he may be entitled on the case as stated."

Separate answers were filed by Spragins, Mrs Weakley, and Mrs. Sale, in which were incorporated demurrers; and a joint demurrer was also filed by Frank B. Gurley and several of the heirs and distributees. The causes of demurrer assigned were—1st, that the bill was wanting in equity, because it showed that the complainant had full, complete, and adequate remedies at law; 2d, that it was multifarious; 3d, that it showed on its face no reason for removing the administration of the estate from the Probate Court, after proceedings had been commenced in that court. The chancellor overruled the demurrer, and his decree on the demurrer is now assigned as error, jointly and severally, by the defendants who demurred.

CABANISS & WARD, for the creditors, and LEWIS & ROBINSON for the other appellants.—1. The bill is multifarious. There is a manifest misjoinder of defendants, and an improper joinder of several distinct causes of action. The administrator in chief has no connection whatever with the claims of the creditors, or the controversies that have arisen between them and the complainant; nor has he any interest whatever in the matters of dispute between the complainant and the several purchasers of the lands at his sale. These creditors and purchasers, in like manner, have no interest in his settlement, nor any mutual and common interest in the claims of each other; and the decree in favor of Mrs. Gurley is separate and distinct from each and all of these other matters. *Kennedy v. Kennedy*, 2 Ala. 571; *Hardin v. Swoope*, 47 Ala. 273.

2. The bill is wanting in equity, because, as to each and all of these matters, there is a complete remedy at law, or in the Probate Court. The settlement of F. B. Gurley's administration has already been commenced in the Probate Court, and no reason is shown why it can not be finished in that court. Whether the sale of the lands by the administrator be valid or void, the powers of the Probate Court are fully adequate to grant the appropriate relief: by ratifying and confirming it, if valid; or by a resale, at the risk of the purchasers; or by granting another order of sale.

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3. As to the judgments against the administrator, the alleged verbal agreements are no defense, either at law or in equity.—*Paddock v. Palmer*, 19 Vermont, 581; *Briggs v. Law*, 4 John. Ch. 22; *Wright v. Barr*, 53 Mo. 340; *Grace v. Martin*, 47 Ala. 135; 12 Indiana, 383; *Knight v. Cherry*, Supreme Court of Missouri, cited in 5 Central Law Journal, August 3, 1877, p. 117.

4. An administrator cannot remove the settlement of his intestate's estate into equity, without alleging and proving some special circumstances showing the necessity for the transfer.—*Gould v. Hayes*, 19 Ala. 450; *McNeill v. McNeill*, 36 Ala. 115; *Hill v. Armistead*, at the last term. In this respect, the bill is defective. Whatever complication or embarrassment appears in the affairs of the estate, is the result of the complainant's own negligence and mismanagement; and he can not be allowed to take advantage of his own wrong, at the expense of creditors and distributees.

5. The bill can not be maintained as a bill of conformity. The precise object of such a bill is shown in 1 Story's Equity, §§ 544-5, and cases cited in notes; and the cases further show that such bills are not favored by the courts. Under these authorities, the bill is wanting in equity—1st, because, instead of "finding the affairs of his intestate so much involved that he can not safely administer the estate, except under the direction of a court of equity," it shows that the complication now existing has grown up under his own administration, and has resulted from his own neglect; 2d, because, instead of adjusting the claims of creditors, it shows that there is nothing about them to adjust—that the claims are just and valid, and that they have been satisfied by the purchases of land; and, 3d, because, instead of showing a necessity for the interposition of a court of equity, it shows an adequate remedy at law for each separate matter complained of.—See, also, *Buckle v. Atleo*, 2 Vernon, 37; *Blackwell's case*, 1 Vernon, 152; *Jackson v. Leaf*, 1 Jac. & W. 229; *Rush v. Higgs*, 4 Vesey, 638, and cases cited in notes.

D. D. SHELBY, *contra*.—1. The court should take jurisdiction, to protect the complainant against the creditors who have recovered judgments against him. On the facts alleged in the bill, which are admitted by the demurrer, the complainant had good reason to believe, when these judgments were rendered, that the lands would sell for enough to pay them in full; and the subsequent depreciation in the value of the lands, for which he is not responsible, now renders them insufficient, and leaves him personally liable, in viola-



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tion of the agreement under which they were rendered.—2 Story's Equity, § 885; High on Injunctions, §§ 191, 830; *Byrne v. McDow*, 23 Ala. 404; 4 Hen. & M. 460; Hilliard on Injunctions, 326, 332; *Washington v. Emery*, 4 Jones' Eq. N. C. 37-38; Freeman on Judgments, § 505, and cases cited; *Thomson v. Palmer*, 2 Rich. 33; see, also, 16 Ala. 339; 5 Greenl. 33.

2. The jurisdiction of the court is maintainable, also, on the ground of preventing a multiplicity of suits.—Story's Eq. Pl. § 287; *Thomas v. Palmer*, *supra*. A bill may be objectionable for the opposite fault to that of multifariousness—that is to say, for an improper splitting up of a single cause of action, and undue multiplying of subjects of litigation. This objection might have been urged, if, on the facts here stated, one bill had been filed to settle Gurley's administration; a second, to settle the complainant's administration; a third, to relieve him from being charged with the lands decreed to Mrs. Gurley; and several others, against Mrs. Weakley, Mrs. Sale, and Spragins, respectively. But a court of equity will not permit a bill to be brought for a part of a matter only, where the whole is the proper subject of one suit.

3. The bill is not multifarious. Its purpose is to protect the administrator from individual liability on the judgments, and to settle the estate; and this being its purpose, it was necessary to give a history of the administration, and show the condition of the estate. The purpose of the bill is shown by its prayer, and the question of multifariousness must be determined by the prayer for relief. The incorporation of matters as to which no relief is asked, or as to which the complainant is not entitled to any relief, does not make a bill multifarious.—Story's Eq. Pl. §§ 271, 271a, 271b, 283; *Pleasants v. Glasscock*, 1 Sm. & Mar. Ch. 17; *Dick v. Dick*, 1 Hogan, 290; *McCabe v. Bellows*, 1 Allen, 269; *Carpenter v. Hull*, 18 Ala. 439; *Lee v. Lee*, at the last term. As to the objection of multifariousness, it is impossible to lay down any rule universally applicable, and equally impossible to reconcile all the adjudged cases; yet, as a general rule, all parties are properly united in one bill, who have an interest in the principal matter in controversy, though their interests may be distinct, and may have arisen under different contracts.—*Gaines v. Chew*, 3 How. U. S. 641; Story's Eq. Pl. 284, and note 4; *Larkins v. Biddle*, 21 Ala. 252; *Fleming v. Gilmer*, 35 Ala. 67. In this case, the principal matter in controversy is the land belonging to Gurley's estate, in which all the parties to the bill are interested, or claim an interest, as heirs, distributees, or creditors; and a court of

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equity alone can settle their respective claims, and give the purchaser a good title.

MANNING, J.—Appellee, Hammond, administrator *de bonis non*, &c., of John Gurley, deceased, filed his bill of complaint in this cause, to remove his administration from the Probate Court of Madison county, into the Chancery Court. This is the principal object of the suit. It was brought March 30, 1877. In December, 1872, he had caused a citation to issue to Frank B. Gurley, his predecessor, and the first administrator of the estate, to settle his administration thereof, in the Probate Court. In January, 1873, Gurley “filed his statement, account, vouchers, and list of heirs, for a final settlement;” and the 28th day of February, 1873, was appointed for action by the court thereon. Then, and some few months afterwards, the matter was regularly continued, but nothing else was ever done in it subsequently. The proceeding seems to have been wholly neglected by both parties, and by the Probate Court, where it remains suspended. The settlement of this administration of Frank B. Gurley is also by the bill sought to be drawn into this cause in the Chancery Court. But it does not properly constitute any part of the present suit. Gurley’s administration is a thing distinct from that of his successor, Hammond. The latter is entitled, certainly, to bring Gurley to a settlement, and to recover any assets that may remain in his hands unadministered; and under the statute, they will then become assets in Hammond’s hands. So, likewise, would he have a right to sue for, and recover from any debtor of the estate, the moneys due from him to it; and they also would be assets for Hammond to administer. But no one would, therefore, suppose that a suit against such debtor could be comprehended in this bill, and carried forward *pari passu*, as a part of this administration cause, instead of being brought in a court of law. Yet such a suit would not be any more distinct from the present cause, than would be the proceeding to bring Gurley to a settlement. In cases of that kind, if litigation be necessary, it must be had in separate and independent suits against the parties supposed to be respectively liable. And it is only the fruits of them that Hammond would be required to account for in the settlement of his administration. Hence, whether the settlement of Gurley ought to be coerced in the Court of Probate, or in the Chancery Court, for which latter course no reason is shown, it is not in the present cause that it should be done.

2. The bill further sets forth, that Rebecca Gurley, widow

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of appellee's intestate, had, by bill in chancery filed in 1868, sued for dower in the lands, about 1870 acres, of which her husband died seized, and in certain other lands of which he had been seized during her marriage to him, but which he had, in separate parcels, given to his sons, William, Frank, and Thomas, severally; and also for rent, according to the statute, for the lands of which he died seized; that commissioners, appointed by the chancellor, had set off, and reported, in November, 1872, about 540 acres of said land for the dower of said Rebecca, of which about 284 acres were of the lands that had been given by intestate to his sons; and that afterwards, in December, 1875, a decree in said cause, purporting to have been rendered by consent of all the parties, including appellee as administrator, assigned to said Rebecca 280 acres of said lands in fee-simple, in lieu of the parcels allotted to her by the commissioners, and ordered that \$2,000 be paid to her by complainant (appellee), for rent of the lands of the estate since the death of intestate. But, complainant avers that the recital in the record in that cause, under date of January, 1872, that he had been made a party thereto in the place of the former administrator, Frank B. Gurley, and the recital of consent to the decree, are not true, so far as he is concerned; that the agreement to the consent-decree was made among the heirs of his intestate, without his participation, or consent, or knowledge; and that he had no information thereof, until a few days before the filing of the present bill.

The bill further alleges, that the \$2,000 had been paid to said Rebecca, without complainant's authority or knowledge, by the said Thomas P. and Frank B. Gurley, who now claim that they were thus subrogated to her right to demand and have said sum from complainant; and that, insisting thereupon, they and some other persons, who respectively bought lands of the intestate, at a sale thereof made by complainant under an order of the Probate Court, to enable him to pay debts, refused to pay him therefor, and assert a right to set off said \$2,000 and interest, under an arrangement among themselves, against the price they bid for said lands; of which they retain the possession.

In respect to this sale, or offer to sell, complainant was authorized, it seems, by a decree of the Probate Court, rendered in April, 1874, upon his petition, to sell 782 acres, part of the lands of said estate, to pay its debts; the sale to be made "at public outcry, at the court-house door in said county, in manner and form as the law directs in such cases, after having first given notice for at least three successive weeks, of the time, place and terms of sale, in the *Huntsville*



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*Advocate,*" etc. Under this order, according to the bill, complainant advertised a sale of the lands in December, 1875, for cash; at which sale Thomas P. Gurley bid off 200 acres, more or less, for \$1,075; and James Hambrick bid off about 80 acres, for \$305; and Ellen M. Weakley, Elias B. Spragins and Sallie P. Sale bid off 470 acres, more or less, for \$3,461.38; and Louisa C. E. Vincent bid off about 40 acres, for \$21, which she paid therefor,—the said Louisa being the only one of the persons who paid the prices they respectively bid. No account of this proceeding was rendered to the Probate Court, until the 14th of February, 1877; at which time, complainant reported the purchase and payment made by Mrs. Vincent, the sale to whom was confirmed, and in respect to the rest of the land, says that it "was all offered for sale, and bid off by different persons, who did not comply with the terms of said sale, or with any part thereof; and the undersigned has again advertised all of said lands for sale, excepting the said forty acres purchased and paid for by the said Louisa C. Vincent."

The decree of sale made by the Probate Court is not alleged to be invalid, and does not appear to be so; though it is averred in the bill that "said decree, by mistake, fails to show on what terms said land was to be sold." A decree to sell lands to pay debts, without authorizing any credit, is, in effect, an order to sell for cash. It is only when time is to be allowed for the payment of the whole, or a part of the purchase-money, that it is necessary, though it is always advisable, that the decree should specify the terms of sale. See Revised Code, §§ 2086, 2090, embraced in § 2456 of Code of 1876.

3. Upon averments which are substantially as above stated, one of the prayers of the bill in this cause is, that the Chancery Court will order "the register of this court to sell all of the real estate which now belongs to the estate of said decedent, on such terms as the court may direct." But, no legal reason is thus far shown, why that court should intervene to do so. Not only has the Probate Court all the authority necessary to this end, but, on complainant's application, made more than two years after his appointment, that court, in April, 1874, authorized him to sell all the land he then deemed necessary for the payment of the debts. Yet twenty months were suffered to elapse before he endeavored to avail himself of this authority; and when all the persons but one, to whom the lands had been cried off, refused to pay for them, more than a year was allowed to pass away, before any report thereof was made, or any further effort to effectuate a sale. The alleged demand of the bidders,

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that they should be allowed to set off the amount they claimed as due from complainant through Rebecca Gurley to them, against the price of the lands, or to pay this price therewith, was a pretension so destitute of support in law, that it could create no obstacle to a resale of the lands, at their risk. There was no order of confirmation by the Probate Court, of any sales to them; nor could the pretension referred to cast the slightest cloud, in the judgment of any body, upon the title that would be acquired by a purchaser at a subsequent sale, from the administrator; and since it is only with this part of the matter of the present bill, that the decree in Rebecca Gurley's suit for dower and rent can have any such relation as might bring it within the scope of this suit, the bill, if it were maintainable at all, would be multifarious for embracing that decree, had any relief been prayed for in respect thereto. But, perhaps because it is obviously irrelevant matter, the bill does not seek to set aside or vacate that decree.

4. It is further, however, alleged by complainant, that the defendants Ellen M. Weakley, Sallie P. Sale, and Robert S. Spragins, the latter as executor of Elias C. Spragins, deceased, having severally just claims against the estate of his intestate, brought their actions in the Circuit Court of Madison county, thereupon, against complainant as administrator; who, there being no assets of said estate except the lands, allowed them, in October, 1873, to take judgments therein, amounting all together to nearly \$3,000, upon "an agreement and understanding, that no effort was to be made to charge him personally, or to charge the sureties upon his bond, with the amount of such judgments;" that notwithstanding this, said Ellen M. Weakley had, in 1876, brought suit in the Circuit Court of Madison county, against complainant and his bondsmen, and is now prosecuting the same; and that, although, at the time said judgments were taken, the land of said estate would have sold for money enough to pay the debts, it would not now do so, because of the great depreciation in its value, in consequence of the depreciation in the value of property generally. Complainant further alleges, that he has received as administrator only \$21, and has paid out \$263; that the personal estate is insufficient to pay the debts, and the real estate will have to be sold for that purpose; that, "in his opinion, said estate is insolvent;" that Frank B. Gurley gave a bond in \$12,000, with Thomas P. Gurley and William R. Gurley as his sureties, and has never made a final settlement of his administration; that upon such settlement said Frank will be indebted to the estate in a large sum; and that the accounts

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between complainant and said Gurleys are too complicated to be settled in the Probate Court, and justice can only be done in the premises in a court of equity; wherefore he prays that court to take jurisdiction of all these matters, and settle the same, &c. There is, also, the general prayer for relief.

It is quite clear that complainant could not be allowed to prove that such an agreement and understanding as that he sets up was orally entered into with the judgment creditors mentioned, and thereby defeat the obvious effect of a judgment against him as administrator. Evidently, too, if this were permissible, it would have to be done in suits brought by him against the several parties to such separate judgments alone, and not against them jointly, or against them and other persons. The averment referred to affords no foundation for such a joinder.

5. Nor can the bill be maintained, in respect to these several creditors, upon any other averments therein, as a *bill of conformity*. If the property of the estate is so reduced in value, by the general shrinkage in values, as to be insufficient now to pay the debts which it was more than adequate formerly to discharge; yet, since it appears that, by due diligence in administration, the debts, might have been paid long ago, the administrator wholly fails to make out a case that entitles him to maintain such a bill. It comes rather under the censure mentioned by Justice Story, when he says: "Besides, it has been said, that these bills may be made use of by executors and administrators, to keep creditors out of their money longer than they otherwise would be."—1 Story's Eq. Jur. § 544.

6. It is rare that an estate, of the value of John Gurley's, is so free from complications that embarrass administration, as his estate appears to have been when complainant became administrator. During a period of over five years, according to his bills and exhibits, although nothing is shown that could hinder him in the performance of any of his duties, he has not collected from the former administrator any of the assets, which he says are in his hands; he has not sold any of the real estate, which was subject to be disposed of, to pay the debts, except \$21 worth; he has not paid a dollar to any of the intestate's creditors; and now, when he is urged by them, and by the heirs, to pay the debts, and bring the administration to a close, he seeks to bundle up together all the various matters which touch the estate in any point, and to associate together all the different persons who, independently of one another, are connected with any of such separate matters, and bring them



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all thus intermixed and involved into the Court of Chancery as an administration cause. We are not aware of any authority for this. And such a course, if allowable, would necessarily produce almost inextricable confusion, as well as greatly increase the delay and expense of the litigation.

In *Gould v. Hayes* (19 Ala. 450), speaking of the jurisdiction of courts of equity in matters of administration, this court said: "The remedy in the Orphans' [now Probate] Court being cheaper and more expeditious than that afforded by Chancery, this court, at an early day, doubtless more as a matter of sound policy, than of strict legal requirement, was inclined to confine heirs, distributees, &c. of a deceased person's estate, to the Orphans' Court, in cases where the powers of that court were adequate to administer full relief." It would be well, probably, if this policy had been more vigorously upheld. But, although the parties mentioned, the beneficiaries of an estate, are considered entitled to carry their cause into equity, at any time before the concurrent jurisdiction of the Probate Court over the settlement has attached, without assigning any special reason for doing so; this privilege is not conceded to an executor, or administrator. When he undertakes to transfer the administration into chancery, he must assign a good equitable ground for asking that court to take jurisdiction of it.—*Moore v. Lesueur*, 33 Ala. 241; *McNeill v. McNeill*, 36 Ala. 115; *Hill v. Armistead*, at the last term. The statutes have provided for appeals from particular orders and rulings, as they from time to time are made by the Probate Court, in an estate undergoing administration, without suspending the power of that court over any other matter therein, and without removing the entire cause into the appellate court.—See § 3954 (2244), and those following it, in Code of 1876. But, when a cause in chancery is removed by appeal into this court, it comes here entire; and in the meantime, there is an inconvenient suspension of the jurisdiction of the Chancery Court therein, which hinders it from carrying forward the business of administration.—*Burton v. Brown*, 22 Grattan, 1; *Moore v. Randolph*, 52 Ala. 530.

After a careful consideration of the case, we are of opinion that, for the reasons assigned in the demurrers, the bill is without equity.

The decree of the chancellor overruling the demurrer is, therefore, reversed; and a decree will here be rendered sustaining the demurrer, dissolving the injunction obtained by complainant, and dismissing the bill, without prejudice to the filing of another.

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## Harwood's Adm'r v. Pearson *et al.*

### *Final Settlement of Administrator's Accounts.*

1. *Probate decree on evidence; how considered on appeal.*—When the correctness of a probate decree depends on the evidence, all of which is set out in the bill of exceptions, this court will not disturb it, except under circumstances which would justify the setting aside of the verdict of a jury.

2. *Burden of proof, as to payment, or right of retainer by administrator.*—When an administrator claims a credit, on final settlement of his accounts, for a debt which he has paid, the burden of proving the existence of the debt and its payment is on him; and if he claims to retain for a debt due to himself, he must clearly prove the existence of the debt; but, if the distributees admit the validity of the debt, and contest the credit on the ground of payment, the burden of proving such payment is cast on them.

### APPEAL from the Probate Court of Sumter.

In the matter of the estate of Mrs. Elizabeth D. Harwood, deceased, on final settlement of the accounts and vouchers of Samuel B. M. Harwood, as administrator. The record does not show when the intestate died, nor when letters of administration on her estate were granted to said Samuel B. M. Harwood. The only matter of contest on the settlement was "the allowance of voucher No. 1, which was a note made by the intestate, hereinafter described, and the allowance of any claim for or on account of any money paid therefor as a credit on said note;" but the record does not set out the voucher as claimed, nor show what credit was claimed on account of it, nor what objections were filed to its allowance. The note, as set out in the bill of exceptions, is for \$1,570; is dated the 6th June, 1859; payable twelve months after date, to Samuel B. M. Harwood, executor of Samuel M. Harwood, deceased, with interest from date; purports to be signed by Elizabeth D. Harwood, and by C. F. Harwood and R. E. Harwood as her sureties; and indorsed on it is a credit for \$500 in gold, paid July 27, 1871, to which the name of said Samuel B. M. Harwood is signed. The administrator introduced the note as evidence, and testified, as a witness for himself, that it was given for lands sold by him, as executor of said S. M. Harwood, deceased, under a decree rendered by the Probate Court of said county; that the lands were bought at the sale by Mrs. Elizabeth D. Harwood, the intestate; that he charged himself with the amount of the note on final settlement of his accounts as executor, "and the note was thereupon passed over to him as his property by

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the probate judge, and he has retained the possession of it since that time;" and he produced the record of said final settlement, which was made in March, 1860, and which showed a balance of \$297.25 in his favor as executor. The contestants then introduced a deed, dated the 20th September, 1860, by which said executor, professing to act under an order and decree of said Probate Court, conveyed said lands to Mrs. Elizabeth D. Harwood, the intestate, as the purchaser at the executor's sale; and proved by one James E. Hart, who was one of the contestants, "that said Samuel B. M. Harwood was himself in possession of said lands at the time of his sale as executor, and had continued in the uninterrupted possession thereof ever since, and there had been no change of possession." Said witness testified, on cross-examination by the administrator, "that he was a son-in-law of the intestate, and lived near her at the time of the sale of said lands by said executor, and was familiar with her business affairs; and that she was not, when said note fell due, nor afterwards to the time of her death, in a condition to pay for said lands, except by a sale of negro property, and that she had sold no negroes for that or any other purpose." The contestants then introduced a deed, dated the 31st May, 1869, by which said administrator and his wife conveyed a house and lot in Gainesville to the intestate, for the consideration, as recited therein, of \$1,425; and said witness testified that the intestate "was not in a condition to pay that amount of money at that time, and had been for several years dependent on the bounty of Dr. Pearson and himself." The administrator then introduced, and proved the execution of a bond for titles to said house and lot, from E. A. Roberts and Elisha Lacy, from whom he had purchased the said property; which recited that he had paid \$725 of the purchase-money, and was conditioned to make titles to him, his heirs, or assigns, on payment of the balance, which was \$700; and on which was indorsed his assignment of said note to the intestate, dated September 21, 1860. He then introduced, and proved the execution of a deed from the intestate to himself, for the land which she had bought at his sale as executor; which deed was dated the 21st September, 1860, and recited as its consideration the assignment of said title-bond to her, and the promise of said S. B. M. Harwood to pay the residue of the purchase-money when due. He introduced, also, the testimony of S. A. Meredith, who was a grandson of the intestate, and whose testimony had been reduced to writing by consent, subject to legal objections; and who stated, in substance, that he was present at the "land-trade" between the intestate and the adminis-



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trator, in September, 1860, and that he had frequently heard her speak, up to 1868, about owing said note to the administrator for the purchase-money of the land bought at his sale. The contestants objected to this testimony, and also to the admission of the deed from the administrator to the intestate, but without stating any particular ground of objection; and their objections were overruled. "This was all the evidence in the case; and upon this evidence, and none other, the court rejected and disallowed said voucher, based on said note, as a credit to said administrator, and charged said administrator with the sum of \$500 in gold, indorsed as a credit on said note"; to which rulings exceptions were reserved by the administrator, and which he now assigns as error.

The case was before this court at its December term, 1875, and may be found reported under the name of *Harwood v. Harper*, 54 Ala. 659-69.

SNEDECOR & COCKRELL, for appellant.

COOKE & LITTLE, *contra*.

BRICKELL, C. J.—The correctness of the decree of the Court of Probate depends wholly upon the evidence, all of which is set out in the bill of exceptions. The decree should not be disturbed, unless it is so unsupported by the evidence, and the legitimate inferences from it, that a court having authority would feel justified in setting aside the verdict of a jury founded on the same evidence, in a controversy involving the same issues.—*Kirksey v. Kirksey*, 41 Ala. 626.

The fact to be ascertained is, whether the note of the intestate to the appellant had been paid in her life. When a credit is claimed by an executor, or administrator, and its validity is disputed, the law casts on him the burden of supporting it. If it be a debt he has paid to another, the existence and payment of the debt must be shown.—*Gantt v. Tucker*, 18 Ala. 27; *Savage v. Benham*, 11 Ala. 49. When he claims to retain for a debt due himself, the existence of the debt must be clearly established. If those contesting his right to retain admit the validity of the debt, or, not successfully controverting it, rely on the fact of its payment, the burden of proof rests on them. They stand in the attitude of a defendant pleading payment of a debt, the existence of which is not matter of dispute, on whom the burden of proof always rests.—2 Green. Ev. § 518.

It is not insisted there is any direct evidence of the pay-  
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ment of the note. Payment is an inference, which, it is insisted, must be drawn from the facts, that after its execution the appellant remained in possession of the lands, the purchase-money of which is the consideration of the note, and that the intestate subsequently conveyed them to him. However just such an inference might be, if the facts stood alone, it is repelled, when another, distinct and independent consideration for the conveyance of the lands is shown by the recitals of the deed, and the contemporaneous facts. The repeated recognitions of the debt by the intestate, after the execution of the conveyance, continuing until a short time before her death, are inconsistent with any such inference. There is no evidence in this record, which supports the conclusion that this note had been paid.

The decree must be reversed, and the cause remanded.

## Peebles v. Weir.

### *Attachment by Landlord, for Rent.*

1. *Notice of attachment ; shown by execution of replevy bond.*—The execution of a replevy bond by the defendant, in an attachment case, is an admission of notice, and is sufficient to sustain a judgment by default at the first term (Code of 1876, § 3323), if executed twenty days before the commencement of the term.

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2. *Defects in process*—Defects in the form of process, which are amendable, can only be taken by plea in abatement, and are not available on error or appeal.

3. *Levy of attachment ; by whom made.*—An attachment, issued by a justice of the peace, and returnable to the Circuit Court, must be levied by the sheriff ; a levy by a constable, or a special constable, is void.

4. *Judgment by default ; what will sustain.*—The execution of a replevy bond by the defendant, in an attachment case, is sufficient to sustain a judgment by default, although the levy of the attachment is void, and there was no personal service of process.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. LUTHER R. SMITH.

This action was brought by Mrs. H. E. Weir, against W. P. Peebles, and was commenced by an attachment, sued out before a justice of the peace, on the 12th December, 1877. The affidavit for the attachment stated, "that W. P. Peebles is justly indebted to the said H. E. Weir, for fourteen bales of cotton, due for land rent during the year 1877, after allowing all just offsets and discounts ; and that the said W. P. Peebles is justly indebted for land rent ; and that this attachment is not sued out for the purpose of vexing or harassing

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the said defendant, or other improper motive." The attachment was made returnable to the Circuit Court, and was directed "to any constable of said county." On it were indorsed by the justice these words: "Wm. Halsell, Jr. is hereby appointed special constable to execute papers;" "W. B. Johnson specially appointed to complete attachment;" the former appointment being dated December 12, 1877, and the latter without date. The following levies were also indorsed on it: "Executed on five bales of cotton, December 26th, 1877;" "Executed nine bales;" the former being signed by *W. B. Johnson*, and the latter by *W. M. Halsell*. The record shows also, that on the 26th December, 1877, a replevy bond was executed in the name of the defendant, by A. Sexton as his agent, and approved by the justice who had issued the attachment; the condition of which, after reciting the issue of the attachment, and its levy by William Halsell, as constable, on fourteen bales of cotton, "which have been delivered to said W. P. Peebles on his entering into this bond," proceeded thus: "Now, if the said defendant shall defend said action to effect, or, failing therein, he or his sureties shall return the specific property attached and above mentioned, to the sheriff of Sumter county, within thirty days after judgment in said suit, then this obligation to be void," &c. On the 28th March, 1878, the plaintiff filed a complaint in the cause, claiming \$700, in one count, "for the rent, use, and occupation of" certain lands during the year 1877; and in another count, \$700 due by promissory note, which was set out, dated November 29, 1875, and payable on or before the first day of February, 1878, for fourteen bales of cotton, alleged to be worth \$700. At the ensuing April term, 1878, there was a judgment by default for the plaintiff, with a writ of inquiry; and the damages having been assessed by the jury at \$605.44, the plaintiff remitted \$200, and took judgment final for \$405.44 only.

The errors here assigned are: 1st, the rendition of judgment by default at the first term: 2d, that the judgment was prematurely rendered; 3d, that the levy of the attachment was void, and conferred no jurisdiction on the court; 4th, that the attachment was void, because directed to a constable.

SNEDCOR & COCKRELL, for the appellant.—To sustain a judgment by default at the return term of the attachment, the defendant must be brought in by publication, if a non-resident, or by written notice, personally served, or left at his residence, if he reside in the county.—Code of 1876, § 3260; 36 Ala. 604; 39 Ala. 227. The writ of attachment was itself void, because directed to a constable, instead of



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the sheriff, or any lawful officer; and the levy by the constable was equally void.—*Martin v. Dollar*, 32 Ala. 422; 39 Ala. 227; 49 Ala. 198. The process being void, it was not necessary to plead these defects in abatement.—*Nabors v. Nabors*, 2 Porter, 162. The execution of the replevy bond can not be construed into a waiver of these defects. If it had been executed by the defendant in person, and not by an agent, it could only have amounted to constructive notice, which does not meet the requirements of the statute. But the record shows only a bond executed by a third person, assuming to act as agent for the defendant, and nothing in the record connects the defendant with it; and the bond itself is void, because neither the justice nor the constable had any authority to take it. The record presents only a judgment by default, founded on a void writ and a void levy, without any personal service on the defendant, and without any appearance on his part.

COOKE & LITTLE, *contra*.—Defects in the attachment, or its levy, could only be taken advantage of by plea in abatement; and not having been so taken, they are not available on error.—*Roberts v. Beeson*, 4 Porter, 164; *Nabors v. Thompson*, 1 Ala. 237; *Mitchell v. Allen*, 2 Stew. & P. 247; *Moore v. Fiquet*, 19 Ala. 236. The condition of the replevy bond bound the defendant to appear and defend the action, and his failure to do so authorized the judgment by default. The execution of the bond, and its recitals, estop him from now raising any objections to the validity of the process.—*Goldsmith v. Stelison & Co.*, 39 Ala. 183; *Mead v. Figh*, 4 Ala. 279; 2 Brickell's Digest, 367, § 87.

BRICKELL, C. J.—1. Attachments, founded on a past-due demand, are triable at the term of the court to which they are returnable, if the levy is made, and notice given, twenty days before the commencement of the term.—Code of 1876, § 3323; *Rice v. Clements*, at last term. Actual notice to the defendant, that he may have the opportunity of appearing and making defense, it is the purpose of the statute to afford him, as the condition on which the plaintiff may proceed to trial and judgment at the return term. The purpose of the statute is fully accomplished, whenever, from the proceedings in the cause, it appears in authentic form that he has had actual notice for the time required. The right to replevy the goods levied on by the writ is conferred by the statute,—a right which cannot be exercised without notice of the levy. If the right is exercised, it must be by the execution of a bond, with surety, payable to the plaintiff in the

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writ, in double the amount of the demand, and with condition that, if he fail in the action, he or his sureties will return the specific property within thirty days. If they fail to return it, the bond is forfeited, and execution thereon issues against the principal and sureties, for the amount of the judgment and costs.—Code of 1876, §§ 3289–92. By the execution of the bond, the defendant becomes a party to the suit, and his sureties become parties, so far that an execution may issue against them, if he is unsuccessful in the suit, and does not restore the goods to the custody of the proper officer. The execution of the bond is, therefore, an admission of notice of the levy, and of the suit; and if it is executed twenty days before the commencement of the term, as it was in the present case, authorizes the court to proceed to trial. It is a paper belonging to the files and record of the cause, of which the court must take notice.—Drake on Attachment, § 332; *Wilkinson v. Patterson*, 6 How. (Miss.) 193; *Richards v. Mooney*, 39 Miss. 357; *Binder v. Klive*, 64 Penn. St. 130.

2. The proper direction of an attachment, returnable to the Circuit Court, is “To any sheriff of the State of Alabama.”—Code of 1876, § 3264. If it is erroneously directed, the defect can be made available only by plea in abatement. *Ware v. Todd*, 1 Ala. 199. Defects in process, the matter of a plea in abatement, may be waived. Pleas in abatement can be filed only within the three first days of the term, and the matter of them is waived, if they are not filed within that time, and it cannot on error furnish cause of reversal. Defects of form, in writs of attachment, are amendable, before or during the trial; and the attachment law must be liberally construed to advance its manifest intent.—Code of 1876, § 3315. If these defects were available on error, not having been previously objected to, the plaintiff would be deprived of the right of curing them by amendment.

3–4. The levy of the attachment, by a person appointed by the justice to act as a special constable, was certainly irregular, and void. Of itself, it would not have conferred jurisdiction on the Circuit Court to render judgment by default against the defendant.—*Briersfield v. Austin*, 39 Ala. 227. But the court did not acquire jurisdiction to proceed to judgment by default, from the levy of the writ. It was acquired from the notice to the defendant of the pendency of the suit, which was admitted by the execution of the replevy bond, its recitals, and condition. Jurisdiction of the person of a party to the suit may be acquired by levy of an attachment, followed by the actual or constructive notice the statute authorizes, or by personal service of process, or by voluntary

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appearance without process, or by his voluntary introduction of himself into the proceedings, bringing himself within the reach of proper action by the court.—Drake on Attachment, § 332, and authorities cited.

We do not think any one of the objections taken to the judgment of the Circuit Court ought to prevail, and it is affirmed.

## Logwood v. Hussey.

### *Statutory Action of Detinue for Horses, Mules, &c.*

1. *Conveyance of wife's statutory separate estate.*—Under the statute authorizing the sale and conveyance of property, belonging to the statutory separate estate of the wife, by the joint deed of husband and wife "attested by two witnesses" (Code of 1876, § 2707), it is not necessary that the two witnesses should subscribe their names in the presence of each other, nor that they should both be present when the deed is signed by the grantors.

2. *Contract held conditional sale, and not mortgage.*—An instrument of writing, in form a deed of bargain and sale, conveying personal property by absolute words of conveyance, but reserving to the grantor "the right to redeem the property" by a specified day, and containing a stipulation on his part, in the event of his failure to redeem, that he would pay a certain sum for the use of the property in the meantime,—is a conditional sale, and not a mortgage; when it is shown, also, that the recited consideration was paid, at the request of the grantor, in satisfaction of a debt which he owed to a third person, who held a mortgage on the property to secure it, and that there was no great disproportion between the value of the property and the sum so paid.

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APPEAL from the Circuit Court of Limestone.

Tried before the Hon. W. B. Wood.

This action was brought by Elijah M. Hussey, against John E. Logwood and his wife, Mrs. Hettie B. Logwood, to recover one horse, nine mules, and two hundred bushels of wheat, together with the value of the hire or use of said property during its detention; and was commenced on the 17th January, 1876. The plaintiff claimed the property under a conveyance from the defendants, which was in the following words:

"Know all men by these presents, that we, Hettie B. Logwood and John E. Logwood, for and in consideration of the sum of \$676.44 to us in hand paid, the receipt whereof is hereby acknowledged, do bargain, sell, alien, and convey, to Elijah M. Hussey, executor of the estate of James M. Lane, the following property, to-wit,"—describing the horse and the mules as they were described in the complaint; "also, one ox-wagon; also, fifty acres of wheat which we have sown



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upon the lands rented from James M. Lane in his life-time, and agree to deliver to him, the said Hussey, ready cleaned, less toll. And the said Logwood and wife have the right to redeem the said property by the first day of January, 1876, by paying the first above-mentioned sum, with interest; and it is further understood said property can not be redeemed until the rent due the estate of James M. Lane, for the year 1875, is paid, and then the debt above specified, with interest aforesaid; and if we shall fail, by the first day of January, 1876, to redeem said property, we agree to pay for the use of said above-mentioned [property?] the sum of \$54.

"Test: *James A. Barksdale*, "JOHN E. LOGWOOD,  
"Lizzie D. McDonald, "HETTIE B. LOGWOOD."

The defendants pleaded the general issue, "in short by consent, with leave to give in evidence any matter proper to be pleaded in bar of plaintiff's recovery;" and issue was joined on this plea. Mrs. Logwood also filed several special pleas,—the first averring her coverture; the second, that she was a married woman when she signed "the said pretended mortgage which is the foundation of this suit," and that the said instrument was null and void as to her, and as to her statutory separate property conveyed by it, because it was given to secure a debt due from her husband to the plaintiff; and the third, that the property sued for, except the two hundred bushels of wheat, belonged to her statutory separate estate under the laws of Alabama, and could not be lawfully mortgaged or conveyed by her and her husband in satisfaction of her husband's debt, as by said instrument they pretended to do. The court sustained a demurrer to the first special plea, but overruled the plaintiff's demurrers to the others; and issue was then joined on them.

On the trial, as the bill of exceptions states, the plaintiff offered in evidence the deed above copied, and introduced said Barksdale, one of the subscribing witnesses, "who testified, that he and said John E. Logwood and his wife signed said writing in each other's presence, at the residence of said Logwood and wife, but that Lizzie D. McDonald, the other subscribing witness, was not in the room when he and said Logwood and wife signed said writing, and did not sign it in his presence." The plaintiff then introduced as a witness, "for that purpose alone, said John E. Logwood, who testified, that the signature of said Lizzie D. McDonald was in her handwriting." On this evidence, Mrs. Logwood moved the court to exclude the said conveyance from the jury; but the court overruled the objection and motion, and allowed the conveyance to be read to the jury; to which she reserved an exception. The plaintiff proved, also, a demand and re-

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fusal before suit brought, and the defendants' possession of the property at the commencement of the suit. On the part of the defendants, said John E. Logwood was then introduced as a witness, "and testified, that the property sued for was a part of his wife's statutory separate estate. Being asked to state the consideration of said writing, he testified that, in the year 1874, he and his wife had made an account at the store of George Mason & Co. in the town of Athens, in said county, amounting to \$677.44, and, to secure the payment thereof, had executed to said Mason & Co. their joint notes, with a mortgage on the stock here sued for; that some of said account was for family supplies, and some for plantation supplies, and most of it was used for the latter purpose; that said notes and mortgage fell due on the 1st January, 1875, and said Mason & Co. then demanded payment, or the delivery of the said stock to them; that he, at this juncture, in the name and interest of himself and wife, applied to the plaintiff, and, with the assistance of Luke Pryor, esq., succeeded in getting him to pay off said account, and accept the said writing,—which he did; that plaintiff had no communication about the matter with Mrs. Logwood, but witness attended to the execution of the writing, and presented it signed and attested as it now stands; and that on it the plaintiff discharged the said indebtedness." The witness further testified, that he and his wife were married in the year 1861, and that all her property was derived by gift from her father, Jonathan McDonald; and he was examined at considerable length as to the various uses to which he had applied her money, his investments from time to time, changes of residence, style of living, &c.

The plaintiff then offered in evidence the said mortgage to Mason & Co., with the notes it was given to secure, and the accounts for which the notes were given; and the court admitted them, against the objection of Mrs. Logwood; to which ruling, also, she reserved an exception. The word "*paid*" was written across the face of one of the notes, with the name of Mason & Co. written underneath it. In reference to these notes and the mortgage to Mason & Co., Fred. Sloss, a member of said firm, who was afterwards introduced as a witness by the plaintiff, testified, "that the items in said account were furnished to said John E. Logwood and wife, and were mostly, if not entirely, bought by the former; that the prices are reasonable, usual, and fair; that said account was paid by the plaintiff; that some of said account was for family supplies, and some of it was for plantation supplies; that he probably consulted his attorney, before opening said account, as to what articles Mrs. Logwood's separate estate

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would be liable for; that said notes and mortgage were executed by said Logwood and wife jointly; and that his firm, when plaintiff settled said account, was in the act of sending for and taking charge of said stock." The plaintiff himself testified, on cross-examination, "that Mrs. Logwood was not present when he made the said trade with her husband; that the whole transaction was made with him; that he took the writing, or bill of sale, had it executed, and returned it to witness as it now stands; and that he, witness, never had any conversation with Mrs. Logwood on the subject." This was all the evidence in reference to the circumstances under which the said conveyance, or bill of sale to the plaintiff, was executed. Mrs. Logwood objected to the evidence "going to show that said writing, or bill of sale to the plaintiff, was given in consideration of his paying off said account;" and reserved an exception to the overruling of her objection.

As to the value of the mules, there was some difference in the estimates of the several witnesses. John E. Logwood testified, that their average value was \$150 each, and the value of their annual hire \$25 each. E. R. Raney, a witness for the defendants, said that they were worth about \$125 each at the commencement of the suit; and one Lindsey, another witness for the defendants, estimated their value at \$100 each, and thought they would bring \$85 each at public sale. The plaintiff's witnesses, who had possession of the mules, under contracts of hiring, during the suit, estimated their value at from \$40 to \$70 each, and their annual hire at \$15 each.

This being the substance of all the evidence, as set out at greater length in the bill of exceptions, the court charged the jury, that the conveyance under which the plaintiff claimed the property "was an absolute bill of sale, subject to the condition therein expressed; that if the parties making the conveyance failed to comply with the conditions therein prescribed at the time mentioned, then the deed became absolute; and that it was a question of fact for the jury to determine, whether the parties had complied with the conditions, or had failed or refused to do so." There was no exception to this charge. The court gave also several other charges in writing, of which, to the 4th, 5th, 6th, 7th, and 10th, exceptions were reserved by Mrs. Logwood. These charges were in the following words:

"4. The husband is entitled to the rents, income, or profits of the wife's statutory separate estate, and is not required to account with her, her heirs, or representatives, for them; and he may use them, or invest them for himself, if he



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chooses; or he may give them to his wife, in the same manner as he may give any other property. But, if she claims them as a gift from her husband, she must show by proof that he had divested himself of the title, and invested it in her: he must abandon his right and title to it, and transfer it to her, by such words, acts, or writing, as will clearly show that the title had passed away from him to her.

"5. If the jury believe, from the evidence, that John E. Logwood acquired the property sued for, or any portion of it, with his own money or labor, or by the rents, income, or profits of his wife's separate estate, and held it as his own; then it became his own personal property, and is liable for his debts and contracts, and the sale of it to the plaintiff passed a good title, and entitles him to recover.

"6. If the jury believe, from the evidence, that the account which the defendants were owing to Mason & Co., and to secure which they had given Mason & Co. a mortgage on this property, was for articles of comfort and support of the household, suitable to the degree and condition of the family, and for which the husband would be liable at common law; and that the plaintiff, at the request of defendants, paid said account for them, and, in consideration of the payment of said account, they executed to him the said bill of sale for the property sued for; then the contract was legal, and binding on Mrs. Logwood, and on her statutory separate estate, so far as conveyed by said bill of sale, and the plaintiff is entitled to recover.

"7. But, if the jury should find that the account due Mason & Co. was not for articles of comfort and support of the household, suitable to the degree and condition of the family, but that it was the personal debt of said John E. Logwood, and payment of said debt of her husband was the consideration of the sale of her property; then her statutory separate estate was not liable for, and could not be sold to pay her husband's debt; and if any part of the property in the bill of sale was her statutory estate, said bill of sale was void as to it, and the plaintiff can not recover it."

"10. If the jury find, from the evidence, that John E. Logwood had made a gift of the rents, income, or profits of his wife's separate estate, to her, in such manner as divested him of the right and title to them, and invested it in her, and that this gift was made before the debt to Mason & Co. was incurred, which was paid off for him by the plaintiff; then the said rents and profits so given became a part of her statutory separate estate, and could not be sold by her, unless for the payment of a debt for articles of comfort and support of the household, suitable to the degree and condi-

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tion in life of the family, and for which the husband would be liable at common law; and if the jury find that the property sued for was bought with the proceeds of her separate estate received from her father, or with the rents and profits which her husband had given her, in the manner as before stated; then the sale of said property conveyed no title to the plaintiff, unless it was in payment of articles of comfort and support, as before stated."

Mrs. Logwood requested the court, in writing, to charge the jury—1st, "that if, from the evidence, they find that any of the articles were for the exclusive use of the husband, or for negroes on his farm, and not of the household, and not for the family in a collective capacity, they must find for the defendants;" 2d, "that one who advances money to the husband, to pay an account for necessary supplies, does not thereby clothe himself with the rights of the original creditor." The court refused each of these charges, and exceptions were reserved to their refusal.

The rulings of the court on the pleadings and evidence, and in the charges given and refused, are now assigned as error by Mrs. Logwood.

J. B. McDONALD, with whom were L. P. WALKER and JNO. N. MALONE, for appellant.—1. The deed of husband and wife, conveying the wife's statutory separate estate, if not acknowledged by them, must be attested by two witnesses. Code of 1876, § 2707. To constitute an attestation by a witness, he must be present when the grantor executes the instrument, must be called on to attest it, and must then subscribe his name as a witness.—See the definition of the word *attest*, in 1 Burrill's Law Dic. 112; 1 Bouv. Law Dic. 147; 3 Camp. 232; 9 Mees. & W. 404. The statute is enabling, and must be strictly complied with.—*Warfield v. Ravisies*, 38 Ala. 318; *O'Neal v. Robinson*, 45 Ala. 531; *Hendon v. White*, 52 Ala. 597, and authorities there cited. The same language used in this statute—"attested by two witnesses"—is also used in section 2161, in reference to conveyances of real property by married women; and in section 2160, which relates to conveyances admitted to record on proof; while the preceding section (2159), which gives the form for the probate of conveyances, requires the witness to swear, "that he attested the same in the presence of the grantor, and of the other witness, and that such other witness subscribed his name as a witness in his presence." All these sections, being *in pari materia*, are to be construed together, and the same words must receive the same construction in each section. The prescribed form of probate shows, conclusively,

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the sense in which the words were used by the legislature, and would have rendered the probate of this instrument impossible.

2. The instrument is a mortgage, and not a conditional sale. It has all the *indicia* of a mortgage: it has a redemption clause, and a law-day; the relation of debtor and creditor existed between the parties; the value of the property was nearly double the amount paid by plaintiff; and the possession remained with the vendor, under a contract of hire.—*Turnipseed v. Cunningham*, 16 Ala. 506; *Crews v. Threadgill*, 35 Ala. 334; *Locke v. Palmer*, 26 Ala. 312; *Flagg v. Mann*, 2 Sumner, 486.

3. The law renders the wife's statutory separate estate liable for necessities, and prescribes the manner in which that liability shall be enforced; but there is no authority given to her or her husband, or to both jointly, to mortgage it for their debts or contracts, even for necessities. The account of Mason & Co. embraced many articles for which Mrs. Logwood's estate was not liable, and they could not have enforced their mortgage against her. But the plaintiff does not even occupy the position of Mason & Co.: he stands simply as a creditor, who has paid the husband's debt, at the husband's request, and taken a mortgage on the wife's property as security.—*Riley v. Pierce*, 50 Ala. 93; *Fry v. Hammer*, 50 Ala. 52.

L. PRYOR, and R. A. McLELLAN, *contra*, cited *Jones v. Wilson*, at the last term; *Peebles v. Stalla*, at the last term; *Haynie v. Robertson*, at the present term; 2 Bishop on Married Women, 254-280; 1 Hilliard on Mortgages, 81-96, 514, 520; *West v. Hendrix*, 28 Ala. 226.

STONE, J.—Section 2707 of the Code of 1876 declares, that "the property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly, by instrument of writing attested by two witnesses." The testimony tends to show, that the deed offered in evidence by plaintiff was not attested by the two witnesses in the presence of each other, but that the female attesting witness was not present when the grantors signed their names. Her hand-writing to the attestation is proved. The other witness testified, that he saw the grantors sign their names, and signed his name as a witness in their presence. It is contended, that this is not a sufficient attestation, within the statute above copied. The grantor, John E. Logwood, being introduced for the purpose, testified that the signature of Miss McDonald, as a subscribing witness, is in her proper



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hand-writing. No proof was offered, by him or any one else, of the circumstances under which she signed her name. We think the state of the record justifies us in inferring that, after the deed was signed by the grantors, in the presence of, and attested by Barksdale as a witness, the grantors appeared before Miss McDonald, and requested her to sign it also as a witness, that it might conform to the statute requiring two attesting witnesses; and that, thereupon, she did so sign it.

Our statutes in regard to the attestation of wills are not materially different from that copied above in reference to conveyances by husband and wife, of the wife's statutory separate estate. The former statute was, that wills of realty must be "attested by three or more respectable witnesses, subscribing their names thereto in the presence of such devisor."—Clay's Dig. 596, § 1. The language of the Code is, "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator."—Code of 1876, § 2294. In *Hoffman v. Hoffman*, 26 Ala. 535, and in *Woodcock v. McDonald*, 30 Ala. 411, the witnesses did not sign in the presence of each other, nor did they all see the testator sign the will. Each of the wills was held to be properly executed. In the former of those cases, speaking of witnesses attesting in the presence of each other, it was said: "The statute does not require this, in terms; and although some of the earlier cases seem to have thought it necessary, under the statute of Car. 2, c. 3, the language of which is, in this respect, almost identical with our own, the contrary was expressly ruled in *Smith v. Cadron*, 2 Vesey, Sr., 455, which decision has been followed, both in England and the United States." We think this deed was sufficiently proved to go to the jury.

2. There is nothing in the present record that justifies the conclusion, or inference, that Hussey purchased from Mason & Co. the debts or mortgages on Logwood and wife. The testimony of Logwood himself is, that Hussey paid the debt; and one of the notes secured by the mortgage is marked "*paid*," across its face. Neither is there any evidence that Hussey retained any debt on Logwood; but, on the contrary, it is manifest that neither Logwood nor Mrs. Logwood was under any legal obligation to repay to Hussey the money he paid to Mason & Co. for them. They reserved but a privilege to repossess themselves of the title to the property, but made no promise to do so. The only promise made was, to pay hire for the property, in the event they did not repay to Hussey the money advanced by him, with interest. This transaction was not a mortgage, but a sale to Hussey, with

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a privilege reserved to repurchase; a sale, upon a consideration paid in money, and without evidence that the agreed price was disproportionate to the value. The case is brought directly within the rule declared in *Peeples v. Stalla*, and *Haynie v. Robertson*, at the present term. It is not necessary to repeat the argument on which those cases rest.—See, also, *McKinstry v. Conly*, 12 Ala. 678. Having arrived at the conclusion that the present transaction was a sale with condition to repurchase, it follows that the sale, admitting the property sold to have been the statutory separate estate of Mrs. Logwood, was valid and binding.—See *Peeples v. Stalla*, *supra*.

We deem it unnecessary to consider in detail the various questions reserved in the trial of this cause. In none of them do we find any errors prejudicial to appellant. A few of them are, perhaps, a little too favorable to her; but on the questions of merit, we fully approve the rulings of the Circuit Court, and its judgment is affirmed.

## Day v. Huckabee.

### *Special Action for Damages.*

1. *Residence and freehold in another county; form of plea.*—A plea averring the defendant's residence and freehold in another county, which is matter of abatement only, would be demurrable at common law, if in form a plea in bar; but, under the statute (Code of 1876, §§ 2987, 2990), being determined by the subject-matter, it is a good plea in abatement.

2. *Judgment on demurrer to plea in abatement.*—On overruling a demurrer to a plea in abatement, the plaintiff may, under our practice, plead over, if he elects to do so; but the record must affirmatively show that he claimed the privilege, or he cannot complain that he was deprived of it.

APPEAL from the Circuit Court of Hale.

The record does not show the name of the presiding judge.

This action was brought by Andrew J. Day against Caswell C. Huckabee, and was commenced on the 10th March, 1876. The plaintiff, in his complaint, claimed one thousand dollars, as damages, for that whereas, on the 14th January, 1867, the defendant leased a saw-mill and certain lands in Bibb county to the plaintiff, with the privilege of cutting timber on the lands for the use of the mill, and pointed out the boundaries of the lands; and the plaintiff entered on the lands, and cut timber within the designated boundaries; and afterwards the Brierfield Iron Works Company, a cor-

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poration chartered under the laws of Alabama, claiming the said lands, brought suit against plaintiff and defendant for a trespass on account of the timber so cut and used, and recovered a judgment against them for one thousand dollars, besides costs; and plaintiff was compelled to pay five hundred dollars on said judgment, besides costs and counsel fees, and was put to great trouble and expense in attending court, &c.; wherefore he sues, &c.

At the return term, the defendant filed a plea, which was sworn to, as follows: "Comes the said defendant, in his own proper person, and says the said plaintiff ought not further to sustain this suit, because he says that, at the time the summons and complaint in this cause were issued, he, this defendant, was a freeholder in the county of Perry in said State, and that said county of Perry was at that time the county of his residence; and this he is ready to verify." The plaintiff demurred to this plea, "because the matter set up in said plea can only be pleaded in abatement, while said plea is in form a plea in bar." The court rendered the following judgment on the demurrer: "In this cause, came again the parties by attorney, and thereupon came on to be heard the plaintiff's demurrer to the defendant's plea in abatement; and upon hearing the argument of counsel, and having examined the premises, it is considered by the court, that the plaintiff's demurrer to the said plea in abatement be, and the same is hereby overruled; and after an inspection of the premises, and deliberation by the court, it is considered that the said plea in abatement, by the defendant in manner and form as aforesaid pleaded, is good and sufficient in law to bar and preclude plaintiff from having and maintaining his said action against the defendant; it is therefore considered by the court, that the plaintiff take nothing by his suit, and that the defendant go hence," &c.

The overruling of the demurrer to the plea, and the final judgment rendered, are now assigned as error.

GARRETT & WALKER, for appellant.

BRICKELL, C. J.—At common law, in pleas in abatement, matters of form were regarded as matters of substance; and the present plea would have been demurrable, because it is in form a plea in bar, while its matter is purely in abatement. The statutes have materially changed the common-law system of pleading, and its rules. In reference to pleas, it is declared, "the plea must consist of a succinct statement of the facts relied on, in bar or abatement of the suit, and no objection can be taken thereto, if the facts are so stated



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that a material issue can be taken thereon."—Code of 1876, § 2987. Again, "The fact whether a plea is in bar or abatement, is ascertained by the subject-matter and prayer of the plea." The present plea avers with certainty the residence and freehold of the defendant in another county than that in which he was sued, and its defects of form the statutes cure.

The judgment at common law, on overruling a demurrer to a plea in abatement, was that the writ be quashed—the plaintiff was not allowed to answer over, and contest the truth of the plea. This rule has also been changed by statute; and after a demurrer is overruled, the plaintiff has the right, if he elects, to take issue on the facts.—*Chilton & Bowden v. Harbin*, 6 Ala. 171. If it affirmatively appeared this right was denied appellant by the Circuit Court, the judgment would be erroneous. It must, however, appear affirmatively that he proposed to answer over, or the presumption will be made that he did not desire to contest the facts alleged in the plea.

The judgment is affirmed.

## McKee v. Griffin et al.

### *Action on Official Bond of Register in Chancery.*

1. *Action on bond; non-joinder of obligors.*—Under the present statute (Code of 1876, § 2904), as under the act of 1818 (Clay's Digest, 323. § 61). joint bonds are made joint and several; and a plaintiff may, at his election, sue one, several, or all of them: in an action against one or more, the non-joinder of the others is not pleadable in abatement.

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APPEAL from the Circuit Court of Marshall.

Tried before the Hon. WM. L. WHITLOCK.

This action was brought by William McKee, against William M. Griffin, Washington W. Griffin, and David C. Jordan; and was commenced on the 8th July, 1871. The action was founded on the official bond of Walter P. Macfarlane, as register in chancery for the 32d chancery district; which bond was dated the 25th August, 1857, was conditioned as required by law, and was signed by said defendants, with several others, as sureties for said Macfarlane. The complaint alleged the execution of the bond, set out its condition, and alleged, as a breach, the recovery of a judgment against said Macfarlane, under a garnishment against him as such register in chancery, and the issue and return of an ex-

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execution thereon unsatisfied. The defendants cravedoyer of the bond, and pleaded in abatement the non-joinder of the other obligors who were not sued. The plaintiff demurred to this plea, and moved to strike it from the files; but the court overruled the motion and the demurrer, held the plea sufficient, and rendered judgment for the defendants. The judgment on the demurrer to the plea in abatement is now assigned as error.

THOS. H. WATTS, with ROBINSON & BROWN, for appellant, cited *Ingersoll v. Robinson*, 35 Ala. 292; *Rupert & Cassety v. Elston*, 35 Ala. 79; *Duramus & Harrison v. Whitman*, 26 Ala. 326; *Martin v. Townsend*, 2 Stew. 329; 1 Brickell's Digest, 6, § 92.

H. C. SEMPLE, *contra*. (No brief on file.)

STONE, J.—Under the act of 1818 (Clay's Dig. 323, § 61), it was declared, "Every joint bond, covenant, bill, promissory note, or judgment of any court of record of any State or Territory of the United States, shall be deemed and construed to have the same effect in law, as a joint and several bond, covenant, bill, promissory note, or judgment; and it shall be lawful to sue out process, and proceed to judgment, against any one or more of the obligors, covenantors, or drawers of any such joint bond, covenant, bill, or promissory note, or against any one or more of the defendants to any such joint judgment."

If we were called upon to construe this statute as *res integra*, we would be inclined to hold, that the last clause—that which declares in what form suit shall be brought—was not intended to introduce new elements into the statute, but as defining and declaring what is meant by the precedent words, "joint and several"; namely, that suit on such contracts may be prosecuted "against any one or more of the obligors, covenantors, or promisors." Such has always been the construction of the statute, and such, it is believed, has always been the understanding of the profession. The statute was eminently remedial of a hardship and obstacle in the administration of justice under the rules of the common law; and it has uniformly been considered a duty to construe its provisions liberally, in advancement of the remedy. Of a class with the section copied above, are sections 2 and 8 of the same statute; the former providing for a discontinuance of the suit as to parties not served, and the latter applying the same principles of joint and several, to any cause of action that may exist against two or more partners.

[Ex parte Johnson & Seats.]

These several provisions were enacted in one statute, and should be interpreted in *pari materia*, and as constituting a system.—See *Jones v. Pitcher*, 3 Stew. & Por. 135, 163; *Whitsett v. Womack*, 8 Ala. 466; *Henderson v. Hammond*, 19 Ala. 340; *Boswell v. Morton*, 20 Ala. 235; *Duramus v. Harrison*, 26 Ala. 326; *Rupert v. Elston*, 35 Ala. 79; *Ingersoll v. Robinson*, 35 Ala. 292. And, instead of limiting or restricting these enactments, remedial of the hardships of the common law, later enactments have extended their provisions.—See Code of 1876, sections 2904 to 2913, inclusive.

It is contended for appellee, that the Code, by omitting the last clause of section 1 of the act of 1818, copied above, intended to make a change in the statute, and to declare that suits on such contracts can now be brought only against one joint maker individually, or against all jointly. It is known that, in the preparation of our Code, separation of subjects, and brevity of expression, were cardinal aims. Hence, synonyms and unnecessary words were sought to be omitted. This purpose and policy were sometimes indulged to an extent that renders it necessary to supply omitted words, implied, but not expressed. Sometimes grammatical rules were sacrificed, in promotion of this persistent aim at brevity. We think that, in omitting the last clause of section 1, act of 1818, copied above, and which we have construed as defining and declaring the meaning of the words "joint and several," the authors of the Code did not intend to change the meaning, or impair the usefulness, of this highly beneficial statute.

The demurrer to the plea in abatement should have been sustained. The judgment is reversed, and the cause remanded.

BRICKELL, C. J., not sitting, having been of counsel.

## *Ex parte Johnson & Seats.*

### *Petition for Mandamus to Circuit Court.*

1. *Rehearing after final judgment at law; filing petition.*—A petition for a rehearing after final judgment at law, under the statute (Code of 1876, §§ 3161-66), must be presented to the judge in person, and a filing with the clerk of the court is not equivalent to such presentation.

APPLICATION by petition for a *mandamus* to the Circuit Court of Madison, Hon. LOUIS WYETH presiding, to compel



[Ex parte Johnson &amp; Seats.]

that court to grant a rehearing, or new trial, in a certain cause therein lately pending, wherein one A. J. Hannah was plaintiff, and the petitioners, Johnson & Seats, were defendants, and in which a judgment by default was rendered against said defendants. The circuit judge dismissed the petition for a rehearing, because it was not presented to him within four months after the rendition of the judgment, although it was filed with the clerk within that time; to which ruling the petitioners reserved a bill of exceptions.

BRANDON & JONES, for the petitioners.

BRICKELL, C. J.—This application involves a single question: Is the filing of a petition for a rehearing of an action at law, with the clerk of the court in which judgment was rendered, within four months after the rendition of the judgment, equivalent to the presentment of the petition to the judge of the Circuit Court, to whom it may be addressed? The question must be answered in the negative. The power to entertain such a petition in vacation is statutory, which no judge, or court, had at common law. The statute prescribes the mode of proceeding; and when the exercise of the power is invoked, that mode of proceeding must be observed. Neither parties, nor courts, can substitute another, or dispense with any requisition of the statute. It is not only unauthorized, but useless, to present the petition to the clerk. He has no authority to receive it, no authority to introduce it into the files, and no authority to issue any process founded on it. Until it has been presented to the judge to whom it is addressed, and he has decided to entertain it, and ordered a *supersedeas* of the execution of the judgment, the petition does not become a paper of the court, and the clerk has no duty to perform in reference to it. His first duty is the taking and approval of the bond, and the issue of the *supersedeas*, in obedience to the order of the judge. The power to entertain the petition, and to make the order for the *supersedeas*, is a power belonging not to the Circuit Court, but to a judge thereof. The notice of the time of presenting the petition to the judge, to whom it may be addressed, is to be given by the petitioner. No officer of the court is charged with, or authorized to perform, that duty. Four months from the rendition of judgment is the time within which the petition must be presented to the judge; and if not presented within that period, he is without power to entertain it. The filing of the petition with the clerk was unauthorized; and no presentment of it having been made to the circuit judge, until more than four months after the

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rendition of judgment, it was his duty to refuse to entertain it.

The application for a *mandamus* must be denied, at the costs of the relators.

## Southern Life Ins. Co. v. Roberts.

*Action by Payee, on Accepted Draft, against Acceptor.*

1. *Action by foreign corporation; amendment of complaint in avowment of plaintiff's corporate character.*—In an action by a foreign corporation, if the complaint does not aver the plaintiff's corporate character, the cause should not be struck from the docket on that account, but an amendment should be allowed to supply the defect.

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APPEAL from the Circuit Court of Limestone.

Tried before the Hon. W. B. Wood.

WM. H. WALKER, for the appellant, cited 52 Mo. 17; 36 Indiana, 288; 9 Ala. 513; 31 Ala. 529; 36 Ala. 703; 35 Ala. 477; 46 Ala. 104; Rev. Code, §§ 2657, 2808-9; 29 Ala. 623; 30 Ala. 636; 27 Ala. 326, 532.

MCCLELLAN & MCCLELLAN, *contra*, cited *Ex parte Collins*, 49 Ala. 69; 47 Ala. 674; 44 Ala. 585; 28 Ala. 577; 33 Ala. 662; 10 Ala. 791; 1 Chitty, 256; 7 Wendell, 540; 8 Wendell, 480; 42 Ala. 48; 33 Ala. 106; 5 Wendell, 478; 15 Wendell, 314; 40 N. Y. 410; 106 Mass. 559; 37 Cal. 354.

MANNING, J.—The complaint in this cause begins as follows: "The plaintiff, *the Southern Life Insurance Company, of Memphis, Tennessee*, claims of the defendant," etc. A good cause of action is then set forth, upon an acceptance by defendant of the draft of another person upon him, for a sum of money payable to plaintiff. A demurrer was filed, among other reasons, because the names of the individual partners composing the company, if it be a partnership, were not set forth, and because, if the company be a corporation, it was not alleged and shown how it became so. The demurrer having been sustained by the court, and leave given plaintiff to amend, subject to objection to the amendment when offered, he proposed to set forth in the complaint that the plaintiff was "a body corporate, made public by virtue of the laws and statutes of the State of Tennessee, with a right to sue and be sued" in the name by which it

[Southern Life Ins. Co. v. Roberts.]

was designated in this complaint. The motion thus to amend was overruled, and the court ordered the cause to be stricken from the docket; to which plaintiff excepted, and which is now assigned as error.

The action of the court was founded upon the idea, we presume, which is here insisted upon, that there was no party plaintiff in the cause from the beginning, and that this being so, none could be introduced by an amendment; wherefore, the only proper thing to be done, was to order the cause to be stricken from the docket. The argument of appellee's counsel is as follows: "*The Southern Life Insurance Company, of Memphis, Tennessee*, must be either a competent plaintiff, or it is no plaintiff at all. There is no middle ground, between competency on the one hand, and incompetency on the other. We submit, that there was never any party plaintiff in the cause, and that it was the duty of the court, *ex mero motu*, or on the motion of an *amicus curiae*, to strike the complaint from the files." This argument appears to be founded on the assumption, that, because the company had the power to sue only as a corporation, if it was not alleged in the complaint that it was a corporation, and how it was created, there is no plaintiff at all, and therefore no suit. We cannot concur in this view. The corporation does not, even *quoad hoc*, become non-existent, by a failure to describe the manner and place of its origin. It continues to be a body politic. In this instance, it comes into court by attorney, and with its right name—that conferred upon it, and by which it is known; and we see no reason for denying to it leave to set itself right, as any other suitor may do, upon the record.

The objection of appellee would be more plausible than it is, if the company had sued by a wrong name—one which was not the name of any person or corporation whatever. Yet, even in this case, it would be permitted to amend, under our statute of jeofails, as a natural person would be, whose name should be incorrectly set forth. In the case of the *Alabama Conference, etc. v. Price* (42 Ala. 47), the initial proceeding began as follows: "The petition of the *Alabama Conference of the Methodist Episcopal Church South*, a corporation under the laws of Alabama, respectfully represents," etc. Now, there was no corporation of that name. Its real name was, as mentioned in other parts of the record, "*The Annual Alabama Conference of the Methodist Episcopal Church South*." Wherefore, it might be said, there was no plaintiff. A demurrer, interposed for that cause, was overruled; which being under consideration here, this court, by WALKER, C. J., said: "Upon sustaining the objection, the court would not



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have rendered a final decree, much less a decree conclusive of the merits, but would have permitted an amendment." The authorities cited for appellee do not establish a contrary doctrine. Our statutes are very liberal, in allowing the correction of errors in pending causes, by an amendment; and there was manifest error in the ruling of the court in this instance.

We observe that, by the amendment of the complaint, it was proposed to allege, that plaintiff was a *public* corporation. From the nature of the institution, we should have supposed it could not be so classed. If the transaction by which it acquired the drafts declared on, and became the creditor of defendant, were within the capacity with which it was endowed by its charter, there was nothing to hinder it, as such creditor, from suing its debtor. The allegation that it is a public corporation, if it was not so, can do only harm—certainly no good.

Let the judgment be reversed, and the cause be remanded.

## Barbour & Son v. Washington Fire and Marine Insurance Company.

*Action on Promissory Note, by Indorsee against Maker.*

1. *Plea of payment, and replication thereto.*—In an action on a promissory note, by an indorsee against the maker, a general plea of payment, in the form given in the Code (Form No. 27, p. 706), must be understood to aver a payment which was valid and operative as against the plaintiff, and a general replication to it imposes on the defendant the burden of proving such a payment; but a special replication, which only avers that, before the payment was made, and before the maturity of the note, the plaintiff had become the holder for valuable consideration, is no answer to the plea, and is demurrable.

2. *Payment of note; when valid against assignee.*—A payment of a promissory note to the payee, made before maturity, but after the note has been assigned for valuable consideration, or made after maturity, but with notice or knowledge of the assignment, is not available as against the assignee.

APPEAL from Circuit Court of Choctaw.

Tried before the Hon. LUTHER R. SMITH.

This action was brought by the appellee, a corporation chartered under the laws of Alabama, and doing business in the city of Mobile, against James F. Barbour & Son as partners; was commenced on the 6th April, 1876, and was founded on the defendants' two promissory notes, each for \$500, dated the 8th May, 1875, payable respectively on the 15th December, 1875, and the 1st January, 1876, to the order

[Barbour & Son v. Washington Fire and Marine Insurance Company.]

of T. Eatman & Co., at the Mobile Savings Bank, and assigned by the said Eatman & Co., before maturity, as the complaint alleged, to the plaintiff. The defendants pleaded "that they have paid the debt or demand, for the recovery of which this suit is brought, before the action was commenced." The plaintiff demurred to this plea, but the court overruled the demurrer; and the plaintiff then filed a replication in these words: "And plaintiff says, that previous to the time of the payment alleged by defendants in their said plea, said plaintiff was the holder and *bona fide* purchaser for valuable consideration before maturity of the notes on which this action is founded, which said notes were negotiable and payable in bank; and this the said plaintiff prays may be inquired of by the country." The defendants demurred to this replication, on these grounds: 1st, because it was no answer to the plea; 2d, because it might be true, and yet the plea be good; 3d, because it failed to aver that the payment was not made to the plaintiff. The court overruled the demurrer, and, the defendants declining to rejoin, rendered judgment by *nil dicit* for the plaintiff. These rulings on the pleadings are now assigned as error, with the judgment.

THOS. W. COLEMAN, for appellants.

TAYLOR & MACARTNEY, *contra*.

BRICKELL, C. J.—The plea of payment is in the form prescribed by the Code, and must be understood as affirming that a payment of the notes had been made, which was valid and operative against the plaintiff as indorsee. A general replication would have cast on the defendants the burden of proving such a payment. If the payment was made to the payees, after the plaintiff had acquired the notes for value, before maturity; or if after maturity, and with notice or knowledge that the plaintiff was the holder, it would not have been available.—*Ross v. Drinkard*, 35 Ala. 434. The plaintiff unnecessarily resorted to a special replication, which neither traverses, nor confesses, nor avoids the matter of the plea, and was consequently demurrable.—*Mason v. Craig*, 3 Stew. & Port. 389; *Winter v. Mobile Savings Bank*, 54 Ala. 172. Every averment of the replication may be true, and the payment may have been made to the plaintiff. The demurrer to the replication ought to have been sustained.

Reversed and remanded.

[Arnett v. Bailey.]

## Arnett v. Bailey.

### *Bill in Equity for Partition of Lands, Account of Rents and Profits, and Cancellation of Deed as Cloud on Title.*

1. *Cancellation of deed as cloud on title.*—A bill in equity for the cancellation of a deed, as a cloud on the title to lands, can not be maintained by a person who is not in possession.

2. *When cestui que trust can not come into equity.*—When the legal title to lands is vested in a trustee, the *cestui que trust* can not maintain a bill in equity against an adverse holder, to recover possession, without an averment that the trustee refuses to sue at law.

3. *Partition of lands in equity.*—A court of equity will entertain a bill for the partition of lands, at the suit of one joint tenant, or tenant in common, who shows a clear title to an undivided interest therein.

4. *Sale of decedent's lands, under probate decree, for payment of debts; jurisdiction of court, and sufficiency of petition.*—A petition by an administrator for the sale of devised lands, for the payment of debts, must allege that the personal property is insufficient for that purpose, and that the will contains no power of sale; otherwise, it is not sufficient to give the court jurisdiction, and an order of sale founded on it is void; but, if the will is made an exhibit to the bill, and contains no power of sale, this remedies the want of such an averment in the petition, when the proceedings are collaterally attacked.

5. *Same; amendment of petition; irregularities.*—When the sale is collaterally attacked, and the record shows that two petitions were filed, one will be considered as an amendment of the other, in order to sustain the jurisdiction of the court; and when the jurisdiction is shown to have attached, by the filing of a sufficient petition, the sale can not be collaterally impeached, because the names and residences of all the parties in interest are not stated in the petition; nor because less than forty days elapsed between the filing of the petition and the day set for the hearing; nor because the order setting a day for the hearing of the petition appears to have been made several days before the petition was filed: these are mere irregularities, and do not affect the validity of the sale, when collaterally attacked.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. HENRY C. SPEAKE.

The bill in this case was filed on the 24th January, 1876, by Mrs. Laura W. Arnett, against James M. Bailey and his wife, Mrs. Jane F. Bailey, who was the complainant's sister, and against Benjamin N. Word; and sought a partition of certain lands, of which said Bailey and wife had possession, an account of the rents and profits while in their possession, and the cancellation of the deed under which they claimed the lands. The lands had belonged to Mrs. Jane Mahone, who was the mother of the complainant and Mrs. Bailey, and who, on her death in 1866, by her last will and testament, which was duly admitted to probate after her death, devised said tract of land, with other property, one half to Mrs.

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[Arnett v. Bailey.]

Bailey in fee simple, and the other half to said Benjamin N. Word, in trust for the complainant; the rents and income of her interest to be paid to her by said trustee during her coverture, and the property to be conveyed by him to her on the death of her husband, if she survived him, or to her children in the event of her death. Letters of administration on the estate of Mrs. Mahone were granted to John Turrentine, who, on the 16th January, 1868, sold the lands, under an order of the Probate Court, for the payment of debts; Mrs. Bailey becoming the purchaser, at the price of \$200, and receiving a deed from the administrator, after the confirmation of the sale by the court. This was the deed under which Mr. and Mrs. Bailey claimed and held the lands, and which the bill asked to have cancelled, as a cloud on the title.

The bill alleged that the order, or decree, under which the lands were sold, was void for want of jurisdiction in the court; its averments on this point being in these words: "It is true that, on *October 2, 1867*, an order was made and entered by said Probate Court, setting a petition of said administrator, for an order to sell land, for hearing on the second Monday in December, 1867; but said petition, so set for hearing, failed to allege the jurisdictional facts required by law, in the following particulars: it did not allege an insufficiency of personal property to pay the debts of said decedent; it did not allege that the will of said testatrix gave no power to sell the lands for the payment of debts, and that the personal property was insufficient therefor; it did not give the name of said Benjamin N. Word, one of the devisees; it did not name any one as devisee; it did not give the residence of the heirs or devisees; it did not state that your oratrix was a married woman; nor that the heirs and devisees were over twenty-one years of age; and no notice of said petition, or of the time set for hearing the same, was ever given to the said Benjamin N. Word, or to the said James A. Arnett, the husband of your oratrix, who was then living. It is true, also, that on the *2d November, 1867*, said administrator filed in the said Probate Court another petition for the sale of said land, a copy of which, marked 'Exhibit E,' is hereunto appended as a part of this bill; but said last-named petition was insufficient to give said court jurisdiction to decree the sale of said land, because it failed to give the name of said Benjamin N. Word, as one of the devisees; and because it did not allege that the will gave no power to sell the land for the payment of debts; and no proceedings were ever had by said Probate Court on said last-mentioned petition."

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The said petition, "Exhibit E," which was sworn to on the 1st *November*, 1867, and marked filed 2d *November*, is in these words: "Your petitioner, John Turrentine, as the administrator with the will annexed, as the records of your court will show, states and alleges that the said Jane Mahone, deceased, departed this life, having prior thereto made and published her last will and testament, which has been heretofore duly proved and recorded in your honorable court, and which is made part hereof; in which said last will and testament, the said Jane Mahone devised to her two daughters, Jane F. Peete" [now Mrs. Bailey] and Laura W. Arnett, the following real estate, situated and lying in said county of Limestone, to-wit," particularly describing the lands now in controversy. "Your petitioner, as the administrator aforesaid, further states and alleges, that there are debts, liabilities, and charges against said estate, which have been presented to your petitioner, as administrator as aforesaid, to a larger amount, and payment demanded. Your petitioner, as administrator aforesaid, alleges and charges that the personal property belonging to said estate are wholly insufficient to pay the debts, liabilities, and charges, of and against the estate of said decedent; and he alleges that the real estate above described, which is all the land belonging to said estate, is required to pay the debts of and against said estate, and resort to said land and a sale thereof is necessary to pay the debts against said estate. Your petitioner [states] that said Jane Mahone died leaving, as her only heirs-at-law, as well as legatees and devisees in, of, and under her said will, the following named persons—viz., Jane F. Peete, Laura W. Arnett, wife of James Arnett, and George Jamar; all of whom reside in the State of Alabama, and [are] over the age of twenty-one years. The premises considered, your petitioner prays your honor to decree and order the land above described sold for the payment of the debts against the said estate of said Jane Mahone. He further prays that said Jane F. Peete, Laura W. Arnett and her husband, James Arnett, and George Jamar, be made defendants to said petition, and, for this purpose, that proper process issue to them," &c.

The order setting a day for the hearing, which was also made an exhibit to the bill, is dated *October* 28, 1867, and recites that the administrator has *that day* filed his petition, asking a sale of the lands for the payment of debts; and it appoints the second Monday in December for the hearing, and orders notice to be given to Mrs. Peete, Mrs. Arnett, and George Jamar. The order of sale is dated the 9th *December*, 1867, and is as follows: "This being the day appointed,

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more than forty days since, for hearing the application of John Turrentine, [administrator] with the will annexed in this court of said estate, for an order to sell certain lands, hereinafter described, for the purpose of paying debts of said deceased, and the costs and charges of administration, there being an insufficiency of personal property therefor; said lands being situated and lying in Limestone county, Alabama, and known and described as follows," &c.; "due notice of said filing, and of said day set for hearing, having been [given, by the summons of citation on all the parties defendants to said cause, requiring them to come forward and contest said application, if they thought fit and proper to do so; and no one appearing to contest, and the court being satisfied of the truth of the allegations of said petition, by proof taken by deposition as in chancery cases; from which it appears that there is not sufficient personal property to pay said debts and charges; and all the parties defendant being of full age, and the law being to the satisfaction of the court in all respects complied with; it is therefore ordered, adjudged, and decreed, that said land be sold," &c.

The bill prayed a cancellation of the administrator's deed to Mrs. Bailey, as a cloud on the title to the lands, a partition of the lands between Mrs. Bailey and the complainant, according to the terms of the will, an account of the rents and profits, and general relief. The chancellor sustained a demurrer to the bill, for want of equity, and his decree is now assigned as error.

CABANISS & WARD, for appellant.

R. A. McCLELLAN, *contra*.

STONE J.—The bill in this case admits that the complainant, at the time this suit was commenced, was not in possession of the lands in controversy. That is fatal to it, as a bill to remove a cloud from the title.—*Rea v. Longstreet and Sedgwick*, 54 Ala. 291; *Daniel v. Stewart*, at the last term.

2. Neither can the bill be maintained to recover possession of the lands, without averment, not found in this record, that Word, who holds the legal title in trust, refuses to bring an action for its recovery. If, as the bill avers, the sale under the decree of the Probate Court was void, then the remedy at law was complete and ample, and the Court of Chancery has no jurisdiction. If, on the other hand, the petition for the order of sale is sufficient to give the Probate Court jurisdiction, then the sale and conveyance passed



[Arnett v. Boyley.]

the title from the devisees, and Mrs. Arnett has no remedy in any court.—1 Brick. Dig. 939, § 355.

3. The bill, however, prays partition of the lands, according to the provisions of the will of Mrs. Mahone. For that purpose, the Court of Chancery has jurisdiction, if the complainant has averred a clear title to an undivided interest in the lands.—*Deloney v. Walker*, 9 Por. 497; *Horton v. Sledge*, 29 Ala. 478; *Ormond v. Martin*, 37 Ala. 598; *Sanders v. Robertson*, December term, 1876.

4. The present case was disposed of on demurrer sustained to the bill. In such case, we can only look at the pleadings brought to view by the demurrer—viz., the bill and exhibits thereto, and the defects therein pointed out by the demurrers. The exhibits show an unusual state of facts. On the 28th day of October, 1867, the judge of probate of Limestone county made an order, reciting that the administrator with the will annexed had filed his petition in writing, sworn to, praying for an order “to sell the land belonging to said estate for the purpose of paying the debts, charges, and cost of administration, there being an insufficiency of personal property for said purpose.” Said order set the second Monday in December, “to hear and determine as to said prayer.” The second Monday in December, 1867, was the 9th day of the month; forty-two days after making the order. Four days afterwards—November 1st—a written petition was sworn to by the administrator, before the judge of probate, and it was filed in his office on the next day, which was November 2d, 1867. just thirty-seven days before 9th December. On the 9th December, the order of sale was granted, and the lands were sold under it.

The bill avers that a petition was filed before the order was made, October 28, and that the petition of November 2 was a second petition filed afterwards; that the proceedings, order and sale were had under the first petition, and that said first petition has been lost. The bill further avers, that said first petition was defective in the following particulars: that it did not allege insufficiency of personal property to pay the debts; did not allege that the will of testatrix gives no power to sell lands for the payment of debts, and that the personal property was insufficient therefor; did not give the name of Benjamin N. Word (one of the devisees in trust), as one of the devisees; did not give the residence of the heirs at law or devisees; and did not state that Mrs. Arnett, complainant in this suit, was a married woman.

The petition (found in the record), filed November 2d, 1867, refers to the will, of record in the court, and makes it a part of the petition. This supplies the averment, omitted

[Arnett v. Bailey.]

from the body of the petition, that the will of testatrix contained no power of sale for the payment of debts, as the will contains no such power.—*Mosely v. Tuthill*, 45 Ala. 621, 654. The other averments of the petition of November 2d, 1867, although somewhat informal, are substantially sufficient to uphold the jurisdiction of the Probate Court, under the uniform rulings of this court.—See *King v. Kent*, 29 Ala. 542; *Satcher v. Satcher*, 41 Ala. 26, 39; *Wright v. Ware*, 50 Ala. 549; *Pettus v. McClannahan*, 52 Ala. 55; 1 Brick. Dig. 939, 941, §§ 353, 355, 384, 385.

5. If the averments of the bill be true, there were two petitions; one filed October 28, and the other November 2d. The first is averred to be defective; and if, as alleged, it failed to aver a want of power in the will to make sale for the payment of debts, it failed to assert the statutory ground for the sale of a testator's lands; and there was, therefore, no jurisdiction shown in the Probate Court to order the sale, and the order was void. Such defect is fatal, even on collateral presentation.—Code of Ala. § 2447; *Ala. Conf. M. E. Church, South v. Price*, 42 Ala. 39, 49. It is contended for defendant, appellee in this court, that there was in fact but one petition,—that shown in the record, filed November 2d. If this be so, then only thirty-seven days intervened between the filing of the petition, and the day set for hearing it. We consider it unnecessary to decide the disputed question above. If two petitions were filed, as averred by complainant, then, when collaterally presented, we will consider one as an amendment of the other, and give effect to both of them as conjointly sustaining the jurisdiction.—*Doe, ex dem. Saltonstall v. Riley*, 28 Ala. 164, 181. If only the one copied in the record was filed, then the fact that less than forty days elapsed between the filing of the petition and the day set for the hearing is only matter of regularity, and does not oust the jurisdiction.—*Cox v. Davis*, 17 Ala. 714. The fact, if it be such, that the order setting a day for the hearing preceded the filing of the petition, does not render the proceedings void. Very liberal intendments are indulged, when such proceedings are collaterally presented, if the petition contain enough to give the court jurisdiction.—1 Brick. Dig. 941-2, §§ 385-6-7.

Decree of the chancellor affirmed.

[Meredith v. The State.]

## Meredith v. The State.

### *Indictment for Assault with Intent to Murder.*

1. *Assault with intent to murder; constituents of offense.*—An assault with intent to murder, though made a felony by statute, is a common-law offense, the necessary ingredients of which are unchanged by the statute increasing the punishment: an intentional attempt by violence, without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicating an intent to take his life, constitutes the offense.

2. *Same; intent.*—It is not necessary to prove a specific intent, as contradistinguished from an intent to be implied by the jury from the attendant circumstances: as in cases of murder, the intent must, of necessity, generally be inferred by the jury from the character of the assault, the use of a deadly weapon, and the absence of excusing or palliating circumstances.

3. *Same.*—Whether the intended offense, if consummated, would be murder in the first or in the second degree, is an immaterial inquiry, since there were no degrees in murder at common law; and the court may properly refuse a charge which requires the jury to determine that question.

FROM the Circuit Court of Colbert.

Tried before the Hon. W. B. Wood.

The indictment in this case, which contained but a single count, charged that the defendant, Henry Meredith, "unlawfully, and with malice aforesaid, assaulted Sam Greenhill with a knife, with intent to murder him." The defendant pleaded not guilty, was convicted, and sentenced to imprisonment in the penitentiary for the term of three years. "On the trial," as the bill of exceptions states, "the State swore three witnesses, all colored men, and put them under the rule, namely, Sam Greenhill, the prosecutor, Bob Greenhill, and one West. Sam Greenhill testified, that the defendant, who was also a colored man, came to the house of Bob Greenhill, who was the father-in-law of witness, on the Mhoon place in said county, and stayed all night; that he (witness) was acquainted with defendant before that night, and there had never been the slightest difficulty between them; that witness lived near his said father-in-law, and had a shoe-maker's shop in one room of his house; that in the morning, after having stayed all night, defendant asked Bob Greenhill what his bill was, and was told that it was fifty cents; that he said he had no change, but would pay it if he could change a twenty-dollar bill; that witness, at the request of Bob Greenhill, took out \$19.50 to change said bill with, and started out of the shop, with the money in one hand, and his shoe-knife with the other, but, as he got to the door, turned,

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and threw his knife back into the shop, and walked out, with the money in his right hand; that without an angry word being spoken between him and defendant, and without any quarrel, defendant sprang at him with an open knife, and cut him severely on the side several times, and also on the head; that the wounds were severe, and came near proving fatal; that he caught the defendant, threw him down, and bit him on the face and neck, but inflicted no other wounds on him; that defendant got away from him, and ran off, and witness and others pursued him, but did not catch him; that afterwards, on the same day, the defendant was seen passing through the field, and was arrested, and sent to jail. The witness said that, at the time of said assault, he had no knife, or other weapon, in his hand, or on his person; and that this occurred in said county, on the — day of —, 1877. The State having here rested, the defendant introduced as a witness one Williams, a white man, who was the jailor of the county, and who testified that, when the defendant was brought to the jail, the day after the difficulty, his clothes were torn and very bloody, his coat had a small cut in the left shoulder, and he had a cut or two on his hand; and that his face and neck had been bitten. Defendant then introduced Bob Greenhill as a witness, who testified that he was the father-in-law of the prosecutor; that the defendant stayed all night at his house; that he told defendant, the next morning, he charged him fifty cents for it; that the defendant told him to go to Cherokee, and he would pay the amount in sugar; that witness told him he could not go; that defendant said he had a twenty-dollar bill, and would pay him if he could change it; that witness could not change it, and asked Sam Greenhill to do so; that Sam Greenhill got out the change, but defendant did not produce the twenty-dollar bill; that a stiff argument, or debate, got up between him, defendant, and Sam Greenhill, about the night's lodging and the payment of the fifty cents, and at length grew warm between defendant and Sam Greenhill; that he, witness, tried to allay it; that Sam said he would have the money out of the defendant, and came to the door of the shop with the change in one hand and his shoe-knife in the other, but turned, and threw his knife back into the shop; that he, witness, then turned off, and walked to a wagon that was waiting for him, and left the defendant and Sam still debating about the half-dollar; that he did not see the fighting, having gone some distance, but he came back when his attention was called to it, and defendant ran off, leaving his hat; that Sam was cut severely in several places with a knife; that the defendant was arrested soon afterwards, as he was

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passing through the field, and sent to jail; that witness helped to arrest him, and he was arrested without any violence whatever.

"This being substantially all the evidence in the case, the court charged the jury as follows: '1. To make out this case, it devolves on the State to prove, and the jury must, from the evidence, believe two things: first, an assault by the defendant upon the person of the prosecutor, Sam Greenhill; second, that the assault was made with the intent to murder him. 2. It must be shown that it was the intention of the defendant to murder the person assaulted at the time. The intent may be shown by proof of the character, manner, and violence of the assault, the weapon used, and the declarations of the defendant at the time, or any previous threats made by him. 3. The criminal intent is the essence of the offense. The jury must believe, from the evidence, that the defendant did assault, and with intent to murder, the person named in the indictment, to find him guilty. If these facts are not established by proof, or reasonable inference from the proof, he is not guilty, and you will so find your verdict.'"

The defendant did not except to any one of these charges, but requested several additional charges, which were in writing, and of which the court refused the following:

"2. If the jury believe, from the evidence, that the defendant and Sam Greenhill got into a quarrel, with reference to the payment of a half-dollar claimed of the defendant for his night's lodging, and got into a fight, and cut each other with knives, the defendant is not guilty of an assault with intent to murder said Greenhill, within the meaning of the statute.

"3. Malice is an essential ingredient of the offense of an assault with intent to murder; and if the jury believe from the evidence that, on the morning the difficulty occurred, the defendant and Sam Greenhill got into a sudden quarrel, and fought, and, in the heat of passion, cut each other with knives, the defendant is not guilty as charged in the indictment.

"4. In this offense, the intent to murder must be proved, and it is not to be inferred from the act done, as malice sometimes is, and the specific intent to murder must be proved.

"5. The specific intent to murder must be proved; and to prove an intent to kill, or to wound, or to maim, is not sufficient.

"6. To constitute an assault with intent to murder, the jury must find that, if death had ensued, it would have been

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murder in the first degree under the statute; because it is only murder in that degree that a premeditated design to effect the death of some one is requisite, and nothing less than that premeditated design can amount to an intent to murder.

"8. To constitute the offense with which the defendant is charged, there must exist in the mind of the defendant, at the time of the assault, the same sort of malice that is required in the statutory offense of murder in the first degree.

"9. The sort of malice that the jury must find, from the evidence, existed in the mind of the defendant at the time of the assault, must have been willful, deliberate, malicious, and premeditated; or committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, or burglary; or committed from a premeditated design unlawfully and maliciously to effect the death of some other human being than Sam Greenhill; or committed by an act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life; and unless such malice is proved, the defendant is not guilty of an assault with intent to murder.

"10. In order to make out the offense with which the defendant is charged, it is necessary for the State to show by proof that the assault was made under such circumstances that, if death had ensued, it would have been murder.

"11. Where two men get into a sudden quarrel, without previous malice, and fight; and one of them uses a pocket-knife, and the other a shoe-knife; and in the fight they cut each other; neither is guilty of an assault with intent to murder the other, within the meaning of the statute.

"14. If the proof shows that there was no malice prepense between the defendant and Sam Greenhill—that they were friendly, and had a sudden quarrel, and got into a fight, and, in the heat of passion, the defendant cut Sam Greenhill with a pocket-knife—then he is not guilty of an assault with intent to murder, within the meaning of the statute."

These charges, to the refusal of which severally exceptions were reserved by the defendant, are the only matters here presented for revision.

THOS. H. JACKSON, JAMES JACKSON, and J. B. MOORE, for the prisoner.—1. When there is the least evidence tending to show an exculpatory fact, it is error in the court to refuse to submit it to the jury. There was evidence showing that the defendant and the prosecutor were friendly, and fought on sudden quarrel; and the proof tends strongly to show that



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the prosecutor was the aggressor. His testimony is contradicted in material points by other witnesses, and is in itself improbable. The verdict of the jury is evidently founded on the testimony of the prosecutor alone, the refusal of the charges asked in effect excluding the other evidence from their consideration. 2. The meaning of the word *malice* is frequently misunderstood, being construed to mean passion only. In the offense charged here, the same sort of malice must be proved as is required to make out murder in the first degree. The intent constitutes the offense, and it must be proved: it can not be inferred from the act done.—*Oyletree v. The State*, 28 Ala. 703; *Scitz v. The State*, 23 Ala. 42; 18 Ala. 532; 3 Harring. 571; 27 Maine, 468; 2 Minn. 123; 12 Cushing, 615; *Mooney v. The State*, 33 Ala. 420. That the 14th charge ought to have been given, see *Allen v. The State*, 52 Ala. 391.

JOHN W. A. SANFORD, Attorney-General, for the State.—The 4th charge was calculated to mislead the jury.—*Allen v. The State*, 52 Ala. 391. The 6th charge was properly refused, on the authority of the case of *Oyletree v. The State*, 28 Ala. 693. The other charges were abstract, and were properly refused for that reason.

BRICKELL, C. J.—An assault with intent to murder is not a statutory, but a common-law offense. The statute, without adding to, or diminishing the elements of the offense, as it was known to the common law, by the severer punishment it inflicts, converts it from a high misdemeanor into a felony. No other facts need be proved, than such as were essential to be proved at common law. An assault, an intentional attempt by violence, without legal excuse, and without sufficient provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an intent to take life, constitutes the offense. The intent most often must, of necessity, be inferred from the character of the assault, the want or the use of a deadly weapon, and the presence or absence of excusing or palliating facts and circumstances. If a man, in shooting distance of another, raises a gun, takes aim, and fires, and the ball enters the person of the other, a jury would be authorized from these facts, if the evidence did not show that he was excusable, or did not show palliating circumstances, or that his intent was to maim, or to wound, to infer that his intent was to murder. A man must be taken to intend that which he does, or which is the immediate or necessary consequence of his act.—2 Stark. Ev. 738; *Hadley v. State*, at last term. So, in all cases

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of an unprovoked or inexcusable assault (and when we say unprovoked, we use the term in its legal sense—a want of that degree of provocation, which, if death ensued, would reduce the killing to manslaughter), endangering human life, the intent to murder, the aggravating quality of the offense, may be inferred by the jury from the assault; as in murder, if a man attacks another with a dangerous weapon, and kills him, no sufficient provocation or excuse appearing, the law presumes malice from the act. There was no error in refusing the fourth instruction requested by the prisoner.

Nor was there error in refusing the several instructions, that a specific intent to murder the prosecutor must be proved, there being no evidence of an intent to take the life of any other person. They were calculated to mislead the jury; and if it was intended to assert that an express intent, as contradistinguished from an intent which may be inferred or presumed from the circumstances, must be proved, the proposition is erroneous.—*Moore v. State*, 18 Ala. 432; *Ogletree v. State*, 28 Ala. 693; *Allen v. State*, 52 Ala. 391. It was settled in this latter case,—and we cannot depart from its conclusions,—that the court may refuse charges which devolve on the jury the necessity of inquiring and determining whether, if death had ensued from the assault, the defendant would have been guilty of murder in the first degree. Such instructions are calculated to mislead and confuse a jury, and are essentially erroneous in point of law. The offense is complete, if there is an assault, with intent to murder the person named in the indictment, whether the attendant facts and circumstances would, if death ensued, elevate it to murder in the first, or reduce it to murder in the second degree. As we have already said, the offense is a common-law, and not a statutory offense; and at common law, there are no degrees in murder. These are of statutory creation, and are intended, not to alter or change the essential and distinguishing characteristics of murder as known and defined at common law, but to adapt punishment to the degree of the wickedness of design and malignity of heart each particular case may develop. Every malicious deprivation of human life was at common law, and is under the statute, murder. The only difference is in the punishment inflicted, which is graduated to the degree and malignity of the offense. It is enough to constitute the offense of assault with intent to murder, that there exists malice, which is the element of murder in either degree. If it exists in its most malignant form, as it is by statute made an essential ingredient of murder in the first degree, then the offense is more aggravated, deserving higher punishment, than would be in-

[Washington v. Parker.]

flicted if it exists without such evidence of malignity and depravity. But, if there is an assault endangering life, in the absence of facts excusing it, or of sufficient provocation, and it is directed against the particular individual named in the indictment, the offense is complete.—*People v. Scott*, 6 Mich. 287.

The remaining instructions were also calculated to mislead the jury, and were properly refused. If appropriate to any phase of the evidence, the court would have instructed the jury that an intent to kill would not constitute the aggravated offense charged in the indictment, and would, so far as necessary, have distinguished between murder and manslaughter. This was not the scope of the instructions prayed, but, in effect, the court was asked to say, if the combat was sudden, without evidence of previous malice, the defendant was not guilty, though he may have been the aggressor, and in the course of the combat attempted to kill the prosecutor.

We find no error in the record, and the judgment is affirmed.

## Washington v. Parker.

### *Certiorari on Judgment of Justice of the Peace.*

1. *When certiorari lies on justice's judgment* --When a cause is removed from a justice's court by *certiorari*, it should not be dismissed, because the right of appeal was not lost when the *certiorari* was sued out: the policy of the statutes is to secure a trial on the merits, whether the cause is brought up by appeal or *certiorari*.

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### APPEAL from the Circuit Court of Hale.

The record does not show the name of the presiding judge.

In this case, an attachment was sued out on the 13th April, 1876, before a justice of the peace, by Thomas Parker, against John Washington; and a judgment by default was rendered by the justice, on the 15th April, 1876. On the 17th April, 1876, the defendant sued out a *certiorari* before the probate judge, returnable into the Circuit Court, alleging that the judgment was rendered without personal notice to him. The papers having been sent up to the Circuit Court by the justice, in obedience to the *certiorari*, the cause was there struck from the docket, on motion of the plaintiff, on the ground that an appeal was the proper remedy, instead of a *certiorari*; and this judgment is now assigned as error.



[Westmoreland &amp; Trousdale v. Foster.]

W. W. DUGGER, for appellant.

BRICKELL, C. J.—In practice, a *certiorari* and an appeal are not regarded as concurrent remedies for the revision, or, rather, a trial *de novo* in the Circuit Court, of causes which have been decided by justices of the peace. A *certiorari* has been regarded as a remedy to which the party could resort, after by the lapse of time the right of appeal had been lost. It has been said by this court, the *certiorari* should not be awarded, unless the petition avers a good reason for the failure to appeal.—*Wright v. Gray*, 20 Ala. 363. But, if granted without such averment, the cause cannot be repudiated by the Circuit Court, or the court to which it is returnable.—*Casey v. Bryant*, 1 St. & Port. 51; *Wright v. Gray*, *supra*; *Van Epps v. Smith*, 21 Ala. 317. The policy of the statutes is to favor a speedy trial of such causes on the merits, without regard to defects or irregularities in the proceedings before the justice, or a rigid scrutiny into the mode of their introduction into the higher court. The right to remove by *certiorari* is not by statute expressly confined to cases in which the right of appeal has been lost; and it would be in contravention of the well-defined policy to expedite the trial of such causes on the merits, to repudiate them, when introduced by *certiorari*, because it appears the right of appeal was existing. An appeal is the more convenient remedy, more often resorted to, and therefore, in practice, has been regarded as primary, and not as concurrent with *certiorari*. If the Circuit Court was right in repudiating the cause, the result would be, that on the rendition of its judgment, the appellant could immediately sue out a *certiorari*, and present the case by the same remedy, and in the same mode the court repudiated.

There was error in dismissing the cause; and the judgment must be reversed, and the cause remanded.

## Westmoreland & Trousdale v. Foster.

*Bill in Equity by Assignee of Note given for Rent, against Purchaser of Tenant's Crop, to enforce Statutory Lien.*

1. *Landlord's lien for rent, on tenant's crop; assignment of note.*—The landlord's statutory lien on his tenant's crop, for the rent of the current year (Code of 1876, §§ 3467 *et seq.*), exists independent of the remedy by attachment given to enforce it, and passes by an assignment of the note.

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2. *Same; assignee's remedies.*—The assignee of a note, given for the rent of land, may maintain an action for money had and received, against a purchaser of the tenant's crop, who, having bought with knowledge of his lien, has sold the crop, and received the proceeds of sale; and he may also maintain a bill in equity against such purchaser, notwithstanding his remedy at law.

3. *Same; rights of reversioner and assignee.*—If, before the maturity of the note given for the rent, the reversion of the freehold has passed to another, the rent also passes to him, as an incident of the reversion, notwithstanding the assignment of the note.

4. *Note payable to husband, "trustee," &c.*—When a note is taken by the husband payable to himself, with the words added, "trustee for Mrs. S. J. F.," his wife, the superadded words are mere *descriptio personae*, and are not sufficient to show that the note belongs to his wife.

5. *Transfer of note given for the rent of wife's lands.*—A promissory note, given for the rent of the wife's lands, and payable to the husband, belongs to him, and may be transferred by him without the signature or concurrence of his wife.

6. *Constructive notice of landlord's lien, by recitals of replevin bond.*—When an attachment is sued out to enforce an asserted landlord's lien, and is levied on the tenant's crop, which is thereupon replevied; and the replevin bond recites the issue of the attachment, and its levy on the crops grown on the lands, which are described; these recitals are sufficient to charge a surety on the bond with constructive notice of the claim asserted by the plaintiff in the suit.

## APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 17th March, 1875, by the appellants, suing as partners, against Robert C. Foster and George W. Foster, Jr.; and sought to hold the said Robert C. Foster accountable, as trustee, for the proceeds of the sale of forty-three bales of cotton, which he had received from said George W. Foster, Jr., and which the latter had raised on rented land; the complainants claiming as assignees of the note given for the rent, and charging that said Robert C. Foster had notice of their rights when he received the cotton. According to the allegations of the bill, "George W. Foster, Sr., as trustee for Sarah J. Foster," leased certain lands, known as the "Oak Grove place," to said George W. Foster, Jr., who executed his note, or obligation, for the rent, of which the following is a copy:

"\$2,000.

Courtland, Ala., June 1st, 1873.

"On or before the 1st day of January next, I promise to pay G. W. Foster, trustee of Mrs. Sarah A. (?) Foster, two thousand dollars, for the rent of Oak Grove plantation in Lawrence county, Alabama, near Courtland, for the year 1873. Given under my hand and seal, value received.

"GEORGE W. FOSTER, JR. [SEAL]

On the 12th June, 1873, "said lease, with all the benefits, rights, rents, and privileges thereunder, was transferred and assigned, for valuable consideration," to complainants, "as evidenced by the following indorsement thereon:" "For

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value received, I assign this" [note?] "to Westmoreland & Trousdale, June 12, 1873;" which was signed thus: "*George W. Foster, for Mrs. S. J. Foster, his wife.*" The bill alleged, also, that said complainants, "by virtue of said assignment, became subrogated to all the rights and privileges of said George W. Foster, Sr., in respect to said plantation, and thereby became, in fact and in law, the landlords of said plantation, and said George W. Foster, Jr., thereby became their tenant, and they had and have, by virtue of said assignment, a lien on all the crops raised on said plantation, and on the cotton hereinafter mentioned, which was taken possession of and used by said Robert C. Foster;" that said George W. Foster, Jr., "was duly notified, and had full knowledge, long before said rent became due, that said rent belonged to complainants, and that they had been subrogated to all the rights of said George W. Foster, Sr., under said lease, and that said lease had been assigned to them; and he never repudiated or denied the same, but frequently acknowledged the rights of complainants thereunder, and promised full payment of said rent to them; and said rent for said land is now due and unpaid, and said George W. Foster, Jr., is in default. Complainants further show and charge that, on or about the 12th December, 1873, the said Robert C. Foster took and appropriated to his own use the whole of the crop of cotton raised on said place, to-wit, forty-three bales, appropriating the proceeds of said cotton to the payment of a debt which said George W. Foster, Jr., owed him. At the time of said Robert C. Foster's taking possession of said cotton, and using it as aforesaid, he knew that said George W. Foster, Jr., was indebted to your orators, as before shown, for the rent of said plantation, and that your orators had a lien on said crop, known as the landlord's lien, and that said lien on the crop raised on said plantation belonged to them, under and by virtue of said assignment of said note, and that said rent was unpaid; and your orators charge and allege that said Robert C. Foster is liable to account to them, as trustee, for the proceeds of said crop of cotton, to the extent of their said rent, with interest thereon. The premises considered, your orators pray that said Robert C. Foster and George W. Foster, Jr., be made parties defendant to this bill, by the proper process of this court; that your honor will decree that they are liable to account to your orators for said rent of said plantation, and that a decree be rendered against them for the amount thereof, with the interest thereon;" and for other and further relief, &c.

The foregoing are all the allegations of the bill. The note was made an exhibit to it. Answers under oath were waived.



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The defendants filed separate answers; each demurring to the bill, for want of equity, because the assignment of the note to the plaintiff did not carry with it the landlord's statutory lien for the rent; and because the note was assigned by the husband alone, without the concurrence or signature of his wife, while the note showed on its face that it was given for the rent of lands belonging to the wife's separate estate; and each pleading, in bar of the relief sought by the bill, the proceedings had in a certain attachment suit at law, brought by the plaintiffs as the assignees of the note given for the rent. In said attachment suit, the plaintiffs claimed and asserted the statutory lien given to a landlord for the rent of the current year, and sued out an attachment to enforce it against the cotton for which they sought to hold the defendants liable in this suit; but this court held, on appeal, that the attachment was given only to the landlord, and could not be sued out by his assignee.—See the report of the case, *Foster v. Westmoreland & Trousdale*, 52 Ala. 223.

George W. Foster, Jr., admitted that he had notice, before the maturity of the note given for the rent, that it had been assigned to the complainants; but Robert C. Foster denied that he had any notice of their claim, when he received and sold the cotton; and in reference to the circumstances under which he received and sold the cotton, he stated these facts: When the cotton was seized by the sheriff under said attachment, the said George W. Foster, the defendant in the attachment, desired to replevy it, and induced Robert C. Foster to become his surety on the bond, by agreeing to place the cotton in his hands as indemnity, under a written conveyance specifying the terms under which it was held; which conveyance being executed, and the cotton delivered to him, he signed the bond, and held the cotton until the termination of the attachment suit, and then sold it; and the proceeds of sale not being needed to indemnify the sureties on the replevin bond, he applied the money to the payment of a debt due to himself and another person, according to the terms of the conveyance. "Respondent further states, that he knew nothing of any demand of complainants on said George W. Foster, Jr., for the rents of said plantation, nor did he know upon what grounds or claim said suit had been brought, at the time he signed said bond. When said George W. Foster, Jr., called on respondent, he seemed to be in trouble, and stated that Westmoreland & Trousdale had attached his cotton, and he was compelled to replevy it by bond, or be greatly injured; and to induce respondent to go on his bond, he offered to put the control of the cotton in his hands," &c., as above stated.

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The conveyance under which the cotton was thus turned over to said Robert C. Foster, and the replevin bond, were made exhibits to his answer. The condition of said bond was as follows: "The condition of the above obligation is such, that whereas a writ of attachment, issued by E. P. Shackelford, justice of the peace of said county, at the suit of Westmoreland & Trousdale, against George W. Foster, Jr., to be levied on the crop grown by said Foster on a plantation in Lawrence county known as the 'Foster plantation,' returnable to the February term, 1874, of the Law and Equity Court of Lawrence county, for the sum of \$2,000, has been placed in the hands of W. T. Simmons, sheriff of Lawrence county, and has been by him levied on the following property," &c., specifying the names of a number of persons, tenants on the place, and the number of bales levied on in the possession of each; "and whereas the said property has been delivered to the said George W. Foster, Jr., on his entering into this bond: Now, if the said Foster shall fail in said action, he or his securities shall return the specific property attached and above described, to the sheriff of Lawrence county, within thirty days after judgment in said suit, then this obligation is to be void," &c.

The cause having been submitted to the chancellor on pleadings and proof, he held that the bill contained no equity, and therefore dismissed it, without considering any other questions in the case; and his decree is now assigned as error.

PHELAN & WHEELER, with E. A. O'NEAL, for appellants.—  
1. The landlord's lien is the creature of the statute, and grows out of the contract.—*Dulaney v. Dickinson*, 12 Ala. 601; *Governor v. Davis*, 20 Ala. 366; *McKinney v. Benagh*, 48 Ala. 358; *McDonald v. Morrison*, 50 Ala. 30. Although the remedy by attachment is given only to the landlord, the lien passes with the assignment of the note, according to all the analogies of the law, as shown in the cases of vendor's liens, mortgages, "crop liens," and similar statutory liens.—See cases cited in 2 Brickell's Digest, 257, 515; *Steamboat Battle v. Waring*, 39 Ala. 180; *Harrison v. Marshall*, 6 Porter, 65; *Haden v. Walker*, 5 Ala. 86; *Strother v. Hamburg*, 11 Iowa, 59; *Tripp v. Brownell*, 12 Cush. Mass. 376; *Abraham v. Carter*, at the last term. All liens created by statute, without possession, have the effect of liens at common law accompanied with possession, and enure to the benefit of an assignee.—*Fowler v. Rapley*, 15 Wallace, 328; *Johnson v. Smith*, 11 Humph. 396. As a general rule in equity, the assignment of debt carries with it any lien or collateral security.—*Waller*

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*v. Tate*, 4 B. Mon. 529; *Farmers' Bank v. Fordyce*, 1 Penn. St. 248; 2 Story's Equity, § 1047a.

2. If the lien passed to the complainants by the assignment, then, having no remedy at law for its enforcement, they were entitled to come into equity to enforce it.—1 Story's Equity, §§ 684, 454, 1254-58; 2 Parsons on Contracts, 285; *Price v. Pickett*, 21 Ala. 741. When property is transferred, which is subject to a lien or trust, the lien or trust follows it into the hands of the assignee, and equity will enforce it against him.—*Shepherd v. Taylor*, 5 Peters, 675; *Butt v. Ellett*, 19 Wallace, 344. Even though an action for money had and received might be maintained at law, this does not oust the jurisdiction of equity.—*Waldron v. Simmons*, 28 Ala. 629; *Carlisle v. Wilson*, 13 Vesey, 278.

3. The note shows on its face that it was given for rent; and even if the lands belonged to the wife, the statute gives the rents, income, and profits to the husband, and he might assign the note.—Rev. Code, § 2372.

E. H. FOSTER, with R. O. PICKETT, *contra*.—1. The landlord's lien, and remedy by attachment, are the mere creature of the statute, and can not be extended by construction beyond its terms.—*Foster v. Westmoreland & Trousdale*, 52 Ala. 223; 20 Ala. 189, 544; 19 Ala. 43; 5 Ala. 239; *Wann v. Carter*, 45 Ala. 348. No case can be found, in which a mere statutory lien has been enforced in equity, as a trust: on the contrary, when a statute creates a right, and gives a specific remedy for its enforcement, that remedy is exclusive.

2. No case is made out against Robert C. Foster. He denies that he had any notice of the complainants' rights, and there is no proof of notice to him.

3. The note is payable to the husband, as trustee of his wife; which shows a gift to her, and renders void an assignment by him alone.—*Lyle v. Clements*, 49 Ala. 445.

4. The bill shows that the complainants had an adequate remedy at law, by action on the case.—Sedgwick on Damages, 6th ed., 601, 662, and notes.

STONE, J.—Section 3467 of the Code of 1876, and sections following, are the same as sections 2961 *et seq.* of the Revised Code, as amended by the act approved March 8th, 1871 (Pamph. Acts, 19), the act approved March, 1875 (Pamph. Acts, 254), and the act approved February 9, 1877 (Pamph. Acts, 74). The rights of the present parties must be determined by the act of 1871, because the renting was for the year 1873, before the enactment of the statute of March 18,



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1875. That statute declares, that "a landlord has a lien on the crop grown on rented lands, superior to all other liens, for rent on . . . said lands." It then proceeds to give process of attachment for the enforcement of such lien, in certain specified cases. The most important inquiry, in this case, is, whether the lien exists independent of the statutory remedy given for its enforcement. We think it does, for the following, among other reasons :

*First* : The statute does not say that the lien is dependent on the attachment, or right to sue it out.

*Second* : The remedy provided is by no means commensurate with the right conferred. The lien is on all the crop grown on the rented land, for the current year. The right to sue out attachment arises, only "when the tenant is about to remove the crop from the premises, without paying the rent," or "when he has removed it, or any portion thereof, without the consent of the landlord." If the tenant never removed, or was not about to remove some portion of the crop from the premises, the anomaly would be presented of a clearly defined right conferred, with no remedy for its enforcement, if attachment be the only remedy the landlord can invoke.

*Third* : Analogous liens, mere creatures of the law, as incidents of some contract made, are enforceable by the common processes of the law, in addition to the statutory remedy provided.—See Revised Code, § 1858 ; Code of 1876, § 3286 ; *Abraham v. Carter*, 53 Ala. 8 ; 2 Story's Eq. Ju. §§ 1220, 1227, 1230, 1231 ; *Strother v. Steamboat Hamburg*, 11 Iowa, 59 ; *Johnson v. Smith*, 11 Humph. 396 ; *Sheppard v. Taylor*, 5 Pet. 675 ; *Butt v. Ellet*, 19 Wall. 544.

In *Thompson v. Spinks*, 12 Ala. 155, this court said : "It is manifest, the effect of our statute is, that rent in arrears, or falling due, is merely a debt due from the tenant to the landlord, for the payment of which the latter has a lien on the crop grown on the premises." So, in *Price v. Pickett*, 21 Ala. 741, it was said : "Where the possession is not adverse, the true owner is entitled to recover the rents which have been received by another. In such case, it is money had and received to the use of the owner ; and as the person to whom the rent was paid would be compelled to account in equity, he may also be held responsible in the equitable action for money had and received."

In *McDonald v. Morrison*, 50 Ala. 30, this court said : "The landlord has a lien on the crop grown on rented land, for the rent for the current year. This is a lien which grows out of the contract, and the process of attachment is allowed to enforce this lien. It is not created by the levy of the

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attachment, and it is not dissolved by the death of the defendant and the insolvency of his estate, so far as the crop grown on the rented land is concerned."—See, also, *Smith v. Crockett, Minor*, 277.

The cases of *Blum v. Jones*, 51 Ala. 149, and *Dulaney v. Dickerson*, 12 Ala. 601, are based on the theory, that the landlord's lien is neither a *jus ad rem*, nor a *jus in re*. It confers no title to the property. It is simply a right to have so much money carved out of the proceeds. Trespass, detinue, or trover, can not be maintained on such a right. But the case of *Thompson v. Merriman*, 15 Ala. 166, had explained *Dulaney v. Dickerson*, and showed that, when the crop had been converted into money, and such money was in the hands of a third person, who had purchased the crop with a knowledge of the lien, then *assumpsit*, for money had and received, would lie. *Blum v. Jones* is scarcely reconcilable with *Thompson v. Merriman*. We think the last named case asserts a correct legal proposition.—See *Fowler v. Rapley*, 19 Wall. 328; *Hussey v. Peebles*, 53 Ala. 432.

We hold, that the landlord's lien for rent passed to the appellants in this cause, by the elder Foster's indorsement of the rent-note to them. There was, however, when this suit was commenced, no statute which authorized the transferee of a contract for rent, to sue by attachment.—*Foster v. Westmoreland*, 52 Ala. 223. But, there being a lien on the property, which had passed by the transfer to Westmoreland & Trousdale, the case falls directly within the original jurisdiction of the Chancery Court.—See *Price v. Pickett, supra*; 2 Story's Eq. Ju. §§ 1231, 1227. And this jurisdiction is not taken away, although the common-law court may now administer co-extensive relief.—*Waldron v. Simmons*, 28 Ala. 629.

Of course, this transfer of the lien for rent is subject to another well-defined rule of law; namely, that if, before the maturity of the rent contract, the reversion of the freehold passes to another, the rent, as an incident, will pass and enure to such new owner.—*English v. Key*, 39 Ala. 113; *Tubb v. Fort*, at present term.

Leases, or lettings to rent, are often made in this State, without any written contract signed by the landlord. Such writing is not necessary, unless, by the terms of the contract, it is not to be fully performed within a year.—Code of Ala. § 2121. subd. 5; *Crommelin v. Theiss*, 31 Ala. 412; *Scoggin v. Blackwell*, 36 Ala. 351. There is nothing in the pleadings or evidence, in this cause, which tends to negative a valid contract of renting, and we hold that, under the averments and proofs in this cause, complainants have a subsisting lien on

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the cotton, and its proceeds, for the payment of the note exhibited to the bill.

The bill fails to state whether Mrs. Foster's (George W., sr.) separate estate is statutory or equitable. Ordinarily, this should be shown; for the rights and powers of both husband and wife, under these two classes of estates, are essentially different.—See *Reel v. Overall*, 39 Ala. 138. The answer, in effect, says that her estate is statutory. This, however, can not aid a defective bill. But this inquiry is not necessary in this case. Mrs. Foster is not claiming the cotton, or its proceeds, so far as we are informed. But there is a more conclusive reason than this. The bill does not aver that the plantation, for the rent of which the note was given, was the separate estate of Mrs. Foster. True, the note is payable to G. W. Foster, trustee for Mrs. S. J. Foster; and the bill must be construed as averring the same thing. This is mere *descriptio personae*, and, without more, is wholly insufficient to establish her right.—See *Tate v. Shackelford*, 24 Ala. 510; *Agee v. Williams*, 27 Ala. 644. The note on its face, and as averred, imports only a contract made with G. W. Foster, sr. The answer sets up that it was of the statutory separate estate of Mrs. Foster; but this averment is not proved. Even if it were proved, the note only represents the income and profits, not the *corpus*, of her separate estate. For the disposition of such income and profits, the law does not require a writing signed by husband and wife, attested by witnesses, or acknowledged, &c., under the Code of 1876, §§ 2707–8.

We think, under the proof in this cause, R. C. Foster must be charged with constructive, if not actual notice, of complainants' lien, before he acquired any right to the cotton; and that the lien exists against him. The replevin bond he executed either gave him actual notice, or was sufficient to put him on inquiry.—*Johnson v. Thweatt*, 18 Ala. 741; *Dudley v. Witter*, 46 Ala. 664.

We might do injustice to some of the parties, in the matter of the measure of recovery, if we were to render a final decree here. We, therefore, reverse and remand the cause, that it may be proceeded in according to the principles of this opinion.



[Bankhead v. Owen et al.]

**Bankhead et al. v. Owen.***Bill in Equity to enforce Vendor's Lien on Land.*

1. *Transfer of note by delivery.*—When a promissory note is transferred by delivery merely, without indorsement, the law implies an obligation, on the part of the transferor, to answer for the genuineness of the note, and his own authority to transfer it; but, as a general rule, he incurs no other liability by such transfer, and his connection with the note as a party ceases.

2. *Vendor's lien, and against whom asserted.*—The principle must be regarded as settled in Alabama, that, in the absence of an agreement to the contrary, the vendor retains a lien on the land for the unpaid purchase-money, although he has conveyed by absolute deed, reciting therein that the purchase-money has been paid; which lien will be enforced against all persons, except a bona fide purchaser without notice.

3. *Same; when passes by transfer of note.*—The transfer of a promissory note, given for the purchase-money of land, by delivery merely, without recourse on the vendor, or liability on his part, does not carry with it the right to enforce the vendor's lien on the land.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 16th June, 1876, by Mrs. Martha H. Owen, a married woman, suing by her next friend, against the personal representatives and heirs-at-law of George M. Garth, deceased, to-wit: William S. Bankhead and his wife, Catharine M. (formerly the widow of said Garth), as administrator and administratrix of said Garth's estate, and Kate G. and George Garth, his infant children; and sought to subject a tract of land, which said decedent had bought from one M. W. Mayes, to the payment and satisfaction of one of the notes given for the purchase-money. The land was sold and conveyed by said Mayes to Garth on the 3d December, 1859, at the price of \$3,900; for which Garth executed his two promissory notes, each for \$1,950, falling due on the 1st January, 1861, and 1862, respectively, with interest from 1st January, 1860. Garth died in 1862, and letters of administration on his estate were granted, in 1866, to his widow, who afterwards married said William S. Bankhead; and his estate was declared insolvent on the 17th August, 1868. In 1867, M. W. Hayes, the vendor of the lands, who was the father of the complainant, filed a bill in chancery against said administratrix, to subject the lands to the payment of one of the notes given for the purchase-money; alleging that he had transferred the other note to Isaac N. Owen, who was made a defendant to the bill, and

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| 77 | 506 |
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| 87 | 536 |
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that said Owen was willing to become a party ; and expressing a willingness to have the land sold for the satisfaction of both of the notes. Garth's heirs were not made parties to that suit. Decrees *pro confesso* were taken against both of said defendants ; and a decree was rendered, in May, 1868, declaring a lien on the land in favor of the complainant, and ordering a sale of the lands to pay the amount due on his note, which was over \$3,000. At the sale by the register under this decree, in September, 1868, said Mayes became the purchaser, at the price of \$100, under a written agreement between him and said Owen, prior to the sale, that he should make the purchase for their joint benefit, and that each should have an interest in the land in proportion to the amount of his debt. The sale was reported to the court, and confirmed by the chancellor ; and a deed was made to Mayes by the register under the order of the court. On the 19th December, 1868, Isaac N. Owen sold his note and his interest in the land to Mrs. Owen, the complainant in this suit ; and on the 30th December, 1868, Mayes sold and conveyed the land to her by deed with covenants of warranty. The consideration of the purchase from Owen was \$600, and the deed from Mayes recited as its consideration the payment of \$965. The infant heirs of Garth, not having been made parties to the bill filed by Mayes, brought an action at law, in 1876, to recover the land ; and thereupon the bill in this case was filed.

The bill alleged that the complainant was the owner and holder of one of said notes given by Garth for the purchase-money of the land, which was made an exhibit to the bill, and that it was a lien on the land ; but it did not state how she acquired the note. The defendants denied that the complainant was the owner of the note, and denied that it was a lien on the land ; averred that the lien on the land had been waived and relinquished by Isaac N. Owen ; set up the proceedings in the chancery suit by Mayes, as a bar to the relief sought by the bill ; pleaded the statute of limitations of six and ten years, and the failure of the complainant to file the note as a claim against the insolvent estate of Owen ; and demurred to the bill for want of equity, because it did not show how and when the complainant acquired the note, and because it showed that her claim was barred by the statute of limitations.

The complainant took the depositions of said Isaac N. Owen, and A. G. Owen, her husband ; and this was all the evidence offered on her part, except the bill and exhibits. The defendants offered in evidence, besides the answer and exhibits, a transcript of the proceedings had in the chancery

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suit by Mayes, and a transcript of the proceedings had in the matter of the insolvent estate of Garth. The note, as exhibited, showed no written transfer or indorsement. In reference to his transfer of the note to the complainant, Isaac N. Owen testified as follows: "On the 19th December, 1868, I transferred my interest in said note to Allen G. Owen and his wife, Martha H. Owen, for six hundred dollars, they paying all lawyer's fees and court costs; and with the understanding from Mr. Mayes that he would make a deed to the lands to Mrs. Owen, he being the purchaser at the register's sale. I consider Martha H. Owen as the owner of said note, and it is now filed in the Probate Court of said county." "I did sell my interest in said land to Martha H. Owen, and took the joint obligation of her and her husband for the same. I have no recollection of making any written agreement, as the title was in her father, Mr. Mayes, and he was authorized by me to make her a title to it." "The note was transferred to me, by delivery, by Allen G. Owen. The consideration of said transfer was to secure a debt owed to me by Owen & Sale, Owen & Mayes, and A. G. Owen individually. I transferred said note, as aforesaid, to M. H. Owen and A. G. Owen. The consideration of said note has not been paid in full. A. G. Owen has paid me four or five hundred dollars, but still owes me," &c. The testimony of A. G. Owen, as to the transfer of the note, was substantially the same.

On final hearing, on pleadings and proof, the chancellor overruled all the defenses set up by the respondents, and rendered a decree for the complainant; and his decree is now assigned as error.

CABANISS & WARD, with whom was D. CLOPTON, for appellants, made the following points: 1. The complainant stands in no higher or better position than Isaac N. Owen, her transferror, occupied.—*Coster's Executors v. Bank of Georgia*, 24 Ala. 37. But Isaac N. Owen had no lien on the land, because the entire lien was exhausted by the proceedings had in the former suit, to which he was a party; and he must be held to have waived his lien, by accepting a proportionate interest in the lands under the purchase by Mayes. If a third person had bought at that sale, he would have acquired a good title to the lands, except as against Garth's heirs, who were not parties to the suit. Mayes and Isaac N. Owen are equally concluded by that suit.—*Hunt & Frowner v. Acre*, 28 Ala. 580; *Locker v. Palmer*, 26 Ala. 312; *Ryder v. Innerarity*, 4 Stew. & P. 32; *Day v. Preskett*, 40 Ala.



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624; *Williamson v. Ross*, 33 Ala. 509; *Butler v. Williams*, 5 Heiskell, 241; *Church v. Smith*, 39 Wisc. 492.

2. The lien was lost by the statute of limitations of six years, which barred all remedy at law on the note. As the vendor had conveyed by absolute deed, taking no mortgage or other security on the land, the case does not fall within the influence of *Driver v. Hudspeth*, 16 Ala. 384; and *Relfe v. Relfe*, 34 Ala. 500.

3. The debt was extinguished, by the failure of Mrs. Owen to file it as a claim against the insolvent estate of Garth.

4. The suit was barred by adverse possession for ten years under conveyance of the legal title.

PHELAN & WHEELER, with whom was THOMAS H. WATTS, *contra*.—1. A vendor's lien is in the nature of a mortgage, and is not affected by the bar of the statute of limitations at law.—*Driver v. Hudspeth*, 16 Ala. 384; *Relfe v. Relfe*, 34 Ala. 500; *Mahone v. Haddock*, 44 Ala. 90.

2. Estoppels must be mutual. These defendants were not parties to the former chancery suit, and are not concluded by it; hence, neither the complainant nor Isaac N. Owen can be bound or estopped by it.—*Gwynn v. Hamilton*, 29 Ala. 233, and authorities there cited.

3. The vendor's lien passes by an assignment of the note for the purchase-money, even when the assignment is by delivery merely. The doctrine has been so settled in Alabama for thirty years, and the profession has acquiesced in its correctness.—*White v. Stover*, 10 Ala. 441; *Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 371; *Griffin v. Camack*, 36 Ala. 695; *Magruder v. Campbell*, 40 Ala. 611; *Day v. Preskett*, 40 Ala. 624. These decisions are not in conflict with the cases which hold that, where the assignment is, by express agreement, "without recourse," the lien does not pass.—*Hall's Executors v. Click*, 5 Ala. 463; *Roper v. McCook*, 7 Ala. If a transfer by delivery does not carry with it the vendor's lien, then it destroys and extinguishes that lien, since the transferrer could not enforce it after he had ceased to own the debt; which would be a very singular result, and certainly not within the contemplation of the parties. The lien is but an incident to the debt, and follows the debt in the hands of an assignee, in the absence of an express agreement to the contrary. It is but an equitable remedy for the enforcement of a debt, and may be asserted by the owner of the debt. In equity, the general doctrine is, that a security for a debt follows the debt, and may be asserted by the assignee in his own name; and the whole doctrine of subrogation is but an extension and application of this principle.

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BRICKELL, C. J.—The primary question, rendering all others unimportant, presented by this record, is, whether a transferee by delivery of a promissory note, the consideration of which is the purchase-money of lands,—the transfer not being attended by any agreement, or by circumstances, which charge the vendor with a liability for the ultimate payment of the note, or of the consideration passing to him on the transfer, if the note is not available,—can assert and enforce the equitable lien of the vendor.

As a general rule, the holder of a promissory note, parting with it by mere delivery, must be understood to mean, he will not be responsible for its payment. A special indorsement, in the words usually employed, "*without recourse*," is an express declaration of the absence of responsibility. It is no more than the expression of the implication of the law from a transfer by delivery merely; and, except as passing the legal title to instruments which, under the statute, are made assignable, and are not by the law-merchant negotiable by delivery, its operation and effect, as between transferor and transferee, is that of a transfer by delivery. Assuming to transfer, whether by indorsement, or by mere delivery, necessarily implies the genuineness of the instrument, and the right to transfer; as is always implied, when power is exercised, that there is a right to exercise it, and a subject-matter over which it may be exercised. All this is implied in the ordinary transactions of business. A debtor may pay to his creditor bank-notes, and they may be accepted without a word from the one to the other,—without any warranty of their genuineness; yet, if they prove to be fictitious, the obligations of good faith and conscience require that he should answer for their genuineness. Without the imputation of criminality to him, and of gross folly, or of criminality to the creditor, it cannot be supposed he would tender, or the creditor accept, payment in spurious notes. But, if the notes are genuine, and, without knowledge that the bank has failed and become insolvent, he pays, and the creditor receives, the loss falls upon the creditor. This has long been the settled law of this State.—*Lowry v. Merrill*, 2 Port. 282. So, if a promissory note is transferred, whether by delivery, or by a general indorsement, or a special indorsement declaring an absence of liability to answer for its ultimate payment, the law implies an obligation to answer for its genuineness, and an affirmation of authority to transfer. If the transfer is by delivery merely, and the genuineness of the note, or the authority to transfer, is not matter of dispute, the transferor ceases to be a party to the note, and incurs no responsibility.—Story on Prom. Notes,

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§§ 116-17; 2 Parsons on Notes and Bills, 37. A person cannot be charged as an indorser, unless his name appears in some way written on the paper, whatever other liability may arise from circumstances of which the paper affords no indication.—2 Parsons on Notes and Bills, 15; *May v. Bell*, 27 Ala. 515.

2. The equitable lien of a vendor of lands, for the payment of the purchase-money, though he has made a conveyance, expressing on its face the payment thereof, was first distinctly recognized in this court in *Foster v. Trustees of the Athenaeum*, 3 Ala. 302. The preceding case of *Dupprey v. Frenage*, 3 Stew. & Port. 315, proceeds on the ground, that the lien was a part of the doctrine and principles of our courts of equity, but does not enter into a discussion of the question. Without an express adjudication of this court, the profession, and the community at large, have doubtless, from the earliest history of the State, recognized, and advised, and entered into transactions, without doubting that the lien, as a matter of law, would be raised and enforced by a court of equity, for the protection and indemnity of the vendor, unless, from the nature and facts of the particular transaction, he has waived it. Adopting the language of the court in *Foster v. The Trustees of the Athenaeum*, it must be regarded as settled in this State, that "the vendor, in the absence of any agreement to the contrary, retains a lien on the land he has sold and conveyed, for the unpaid purchase-money; and that this lien will be enforced against a purchaser with notice;" and we add, against all persons, except *bona fide* purchasers without notice.

3. Whether the lien will accompany an assignment of the bond or note given for the purchase-money, is a question embarrassed by irreconcilable conflict of authority in those States of the Union which recognize its existence. The question was first presented to this court in the case of *Hall v. Click*, 5 Ala. 363, in which the transfer of the note was by delivery, without indorsement. An error crept into the syllabus of the case, which the statement of facts corrects, indicating that the assignment was expressly *without recourse*; which has sometimes led to the conclusion, that the decision was limited to assignments of that character; but the assignment was by delivery *without indorsement*, as is expressly recited in the statement of facts. The court, determining the lien did not pass to the transferree, say: "The facts of this case relieve us from the necessity of considering, whether, in any case, the equitable lien of a vendor should be enforced at the suit of an assignee. It is quite enough to say, that there has been no assignment of the lien, and



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that there is no liability, so far as the bill and answer inform us, on the part of Dickerson (the vendor) "to pay Click's" (the vendee) "note."

The question was next discussed, though it did not arise, and, consequently, what is said is mere *dictum*, in *White v. Stover*, 10 Ala. 441; and the opinion is expressed, that the lien would pass to a transferee taking by delivery, without indorsement, the notes for the purchase-money. The judge delivering the opinion falls into the error of supposing that, in *Hull v. Click*, *supra*, the transfer of the notes was by indorsement expressed to be *without recourse*. We can not perceive, if such had been the fact, that it would, in reason or principle, have justified any distinction in the two cases; for, as we have said, so far as the responsibility of the transferor is involved, it is not different, but the same in either case. It is enough to say, however, of that case, that the question was not involved. The vendor, having parted with the notes without indorsement, afterwards obtained them, on a valuable consideration, and he claimed to enforce the lien, not as an assignee, but by virtue of his original title, to which, with all its incidents and equities, he was remitted, when the notes were returned to him; subject, of course, to any defense, or equity, the makers may have acquired against the transferee, while the holder of the notes.—*Page v. Green*, 6 Conn. 338; *Lindsey v. Bates*, 42 Miss. 397; *Cotton v. McGehee*, 54 *Ib.* 570. Neither the transfer of the notes, nor his subsequent acquisition of them, operated an extinguishment of them; nor was there any change of the relation existing between him and the vendee. The vendee stood as his debtor, holding his estate, which a court of equity would not, as between them, permit him to keep, without paying the consideration money. The case, in the light of its real facts—and it is by these its authority as a precedent is to be determined—was that of vendor and vendee, not presenting any question of the rights and equities of a transferee.

The next case, in which an opinion on the question was expressed, is that of *Plowman v. Riddle*, 14 Ala. 169; in which the vendor had sold and transferred a mere equity, and had transferred the notes for the purchase-money by delivery, as collateral security for the payment of a debt due from him to the transferee. The court say: "The rule is settled in this court, that the equitable lien of a vendor will pass to the assignee of a note, given in part payment of the purchase-money." The only authority cited in support of the proposition is *Roper v. McCook*, 7 Ala. 318; which was not a case in which the vendor had an equitable lien, but in which he had reserved the legal title as a security for the

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payment of the purchase-money. Confounding this class of cases with the equitable lien of the vendor, and general expressions which extend beyond the case before the court, has involved the question we are considering in some embarrassment, and produced an erroneous impression, that there is no substantial difference recognized between the security a vendor provides for himself, by retaining the legal title, and the lien or trust a court of equity will raise and enforce for his security, after a conveyance of the legal estate. But of this we shall have occasion to speak more fully hereafter. The court proceed to say: "It is clear that the lien, in the case at bar, is not lost, even upon the authority of the case in 5 Ala. Rep." (*Hall v. Click*); "for the facts as disclosed show, that Riddle" (the vendor) "being indebted, transferred the notes to the Burts as collateral security; consequently, the note is not transferred without recourse, for Riddle is liable for the debt until it is paid." The correctness of this decision cannot be doubted. The vendor had a direct and immediate interest in the payment of the notes, and there was nothing in the transaction to relieve a court of equity from the duty and necessity of raising and enforcing the lien for his protection and indemnity. If it was not raised and enforced, he would sustain loss to the same extent that he would have sustained if he had not parted with the notes. The debt, for which the notes were collateral security, may have been less than the amount of the notes; the surplus, when received, would have been money had and received to his use.

Reviewing the cases, in the order in which they have been presented, the case of *Griggsby v. Hair*, 25 Ala. 327, is the next case, in which the question was considered; and it was said: "It may safely be asserted, as a principle deducible from the decisions of this court, that when the vendor transfers a note, secured by a lien of this nature, either by indorsement or delivery, and binds himself for its payment to the assignee or transferee, the lien on the land, unless expressly waived, is retained, and passes as an incident to the note, and may be enforced by the assignee." Again, "It is true, if a note is assigned without recourse by the vendor, it amounts to an abandonment of the lien on his part, and his assignee can work out no equity to subject the land through him. But, whether or not the parties intended to abandon such lien, is a matter of fact to be gathered from the evidence, and the nature of the transaction." The correctness of the latter sentence may well be questioned, if it is to be construed as importing that, whatever may be the intention of the parties, or their agreement, the lien will in any



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case pass to a transferee or assignee of the note for the purchase-money, unless the vendor remains liable for its payment; for it is because of his liability, and through him, as we shall presently see, and as is said in the sentence of the opinion, preceding that to which we are referring, an equity is worked out in favor of the assignee.

The next case which may be supposed to bear on the question, is that of *Griffin v. Camack*, 36 Ala. 695, which was a bill filed by an assignee of a judgment, founded on notes given for the purchase-money of lands. What was the character of the transfer of the notes, is not expressly stated; and there is nothing to indicate that it did not impose liability on the vendor for their ultimate payment; nor does it appear that the vendor had conveyed to the vendee. The court say: "We think the law is settled in this State, that the unqualified transfer of a note, given for the purchase-money of land, or of a judgment upon the note, is a transfer of the vendor's lien on the land for the payment of the note." The law of the State seems to us expressed in this sentence, with clearness, certainty, and precision; and it cannot be qualified or limited by judicial decision. It is an *unqualified transfer*, which passes the lien, or carries it to the assignee. Indorsements of promissory notes are treated by Judge STORY, who but follows the elementary writers generally, as of four kinds: general, or absolute, restrictive, qualified and conditional. The first is, when the indorsement is in blank, or filled up payable to the indorsee, or his order, without any restrictive, or qualifying, or conditional words. A qualified indorsement "qualifies the duties, obligations, and responsibilities of the indorser, resulting from the general principles of law. Thus, for example, an indorsement of a note to A., "without recourse," or "at his own risk," &c.—Story on Prom. Notes, §§ 141–146; *Hailey v. Falconer*, 32 Ala. 536. An *unqualified transfer* of a promissory note—a transfer without restriction or limitation, certainly without an exclusion of all liability of the vendor for the ultimate payment of the note—is the kind of transfer to which the court referred in this case. A transfer by delivery, generally, is a transfer *without recourse*, and a *qualified*, as distinguished from an *unqualified transfer*. The case of *Wells v. Morrow*, 38 Ala. 125, was that of an unqualified transfer; or, if there was any qualification, it was not in limitation or exclusion, but in enlargement of the liability of the vendor for the payment of the note—he was "*to stand good for it, until it is paid.*"

The equitable lien of a vendor is in the nature of a trust, and the principle on which it rests is, "that a person who



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has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money."—2 Story's Eq. § 1219. It is not, properly speaking, a matter of contract, nor is it strictly attributable to the intention of the parties. For, as is said in *Foster v. Trustees of Atheneum*, 3 Ala. 307, "so far as the presumed lien on the land for the purchase-money rests for support on the supposed intention of the parties, it may be confidently stated that, in this State, it rarely, if ever, exists in the contemplation of the parties, when a conveyance of the land is made. A much more just and rational foundation for it appears to be the principle of equity and justice, which forbids one to enjoy the property of another, without compensation, where it can be accomplished without injury to third persons." The nature and characteristics of the lien, as defined by Judge STORY, have been more than once approved in this court. He says: "The vendor, having the lien, has not any estate in, or right to the land; and it has been very correctly observed of the lien of a judgment creditor, that he has neither a *jus in re*, nor a *jus ad rem*, and, therefore, though he releases all his right to the land, he may extend it afterwards. The lien of a vendor for the purchase-money is not of so high and stringent a nature as that of a judgment creditor; for the latter binds the land according to the course of the common law, whereas the former is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by the decree of a court in the particular case, and it is then made subservient to all the other equities between the parties, and is enforced in its own peculiar manner, and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although sometimes that appellation is loosely applied to it."—*Gilman v. Brown*, 1 Mason, 221; see, also, *Bayley v. Greenleaf*, 7 Wheat. 46.

The equitable lien of the vendor has not, in the course of our decisions, been carefully distinguished at all times from the security the vendor carves out for himself, by retaining in himself the legal estate until the payment of the purchase-money. The two are often spoken of, as if they were of the same character and operation; and yet they have no common element, except that each is a security for a debt—the one, by the contract of the parties; the other, by operation of law, and under a decree of a court of equity. There can be no just and proper distinction drawn between a mortgage to secure the payment of the purchase-money, executed contemporaneously with the conveyance of the land, and a reser-

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vation of the legal estate, as a security for its payment.—*Graham v. McCampbell*, Meigs, 52. The cases of *Roper v. McCook* (7 Ala. 318), *Conner v. Banks* (18 Ala. 42), *Kelly v. Payne* (18 Ala. 371), *Haley v. Bennett* (5 Porter, 452), *Chapman v. Chunn* (5 Ala. 397), *Owen v. Moore* (14 Ala. 640), *Burns v. Taylor* (23 Ala. 255), *Bradford v. Harper* (25 Ala. 237), *Driver v. Hudspeth* (16 Ala. 348), *Relfe v. Relfe* (34 Ala. 500), and *Magruder v. Campbell* (40 Ala. 611), all concur that, when the vendor retains the legal title as a security for the purchase-money, all the essential incidents of a mortgage attach. The vendor, retaining the legal estate, has *the right to and in the land*, on which he may maintain ejectment for the recovery of possession, compelling the vendee to resort to equity for a redemption, or, rather, for a specific performance. He may sue at law on the note, or bond, or bill given for the purchase-money, or seek a foreclosure in equity; and these remedies may be pursued concurrently. The only remedy of the vendee is in equity for a specific performance; and the court can not intervene for his relief, unless he aver, and if the averment is not admitted prove, payment of the purchase-money,—the part of the contract he was bound to perform. The vendee, who has obtained a conveyance, of course is under no necessity of seeking any relief against the vendor. No right to, or interest in the land, remains in the vendor, and, consequently, he can not maintain ejectment for its recovery. All the remedy he may pursue, other than an ordinary action at law, for the recovery of the purchase-money, is in equity for the enforcement of the lien or trust the court raises and enforces for his protection and indemnity. The difference, in right and remedy, between the equitable lien and the security the vendor creates for himself by retaining the legal estate, is so apparent, that it is matter of surprise they should be so often spoken of as if they were identical. Another difference may be remarked: that the title of a *bona fide* purchaser without notice will prevail over the equitable lien, while there can not be a *bona fide* purchaser entitled to protection when the vendor retains the legal estate.

An assignment or transfer of the bond or note given for the purchase-money, when the vendor retains the title, will pass the security, without regard to its character. The transaction is then, in effect, a mortgage; the debt is the principal, and the security an incident. The vendee can never acquire the legal estate, until the debt is paid. The equitable lien is a trust, or a security for the vendor only, raised and enforced for his benefit, and only on the equity existing between him and the vendee, that the one should

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not lose, and the other should not keep the estate, without payment of the consideration money. The equity continues when the transfer of the note or bond involves him in liability for its payment. The transferee to whom he is liable is, by a court of equity, subrogated to the lien; and the court enforces it at his instance, in the payment of the debt, and to the relief of the vendor. But, when he parts with the debt, incurring no liability for its payment, the ground of equity ceases. The interest in the debt passes to the transferee, who has no equity superior to that of any other creditor.—1 Lead. Cases in Equity, 454. This is the theory of the decisions in *Hall v. Click*, and *Griggsby v. Hair*, *supra*, and is asserted in *Plowman v. Riddle*, *supra*. At the last term, it was, after mature consideration, asserted in *Hightower v. Rigsby*; nor is it in conflict, as is earnestly insisted by the counsel for the appellee, with any direct adjudication of this court. The cases supposed to be in conflict (except *White v. Stover*, and *Griffin v. Camack*, *supra*) are all cases in which the vendor had retained the legal title, and covenanted to convey it only on the payment of the purchase-money.

It is on the principle of subrogation, when the transfer involves the transferor in liability, that the lien passes to the transferee. A party claiming subrogation to a security for a debt, which another party has obtained, either by operation of law, or by contract, if the security is not for the payment of the debt, but for the personal indemnity of the party obtaining it, is not entitled to it, if, as to such party, the debt or liability for it has ceased to exist.—*Houston v. Br. Bank Huntsville*, 25 Ala. 250.

Without valuable consideration, by gift, and by mere delivery, the appellee obtained the note for the purchase-money, from a transferee by delivery of the vendor; and at her suit the equitable lien of the vendor can not be raised and enforced.

The decree must be reversed, and a decree here rendered dismissing the bill. The next friend of the appellee must pay the costs in this court, and in the Chancery Court.

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*Bill in Equity for Account and Settlement of Trust Estate.*

1. *Conclusiveness of decree on appeal.*—When this court, on appeal in a chancery cause, partly affirms, and partly reverses the chancellor's decree, and

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remands the cause "for further proceedings not inconsistent with" the opinion filed, the chancellor is concluded by the decree of this court, and can not in any manner change that part of his former decree which was here affirmed.

2. *Duty and liability of trustee.*—Infallibility is not exacted of trustees: they form their best judgment in the light of existing facts, and, if they act in good faith, they are not responsible for results which could not have been foreseen by ordinary vigilance and prudence.

3. *Same.*—To relieve a trustee from liability for the failure to collect moneys which he might have collected, he must show something more than a simple mistake in the calculation of interest.

4. *Compensation of trustee.*—On the facts of this case, the trustee was held entitled, in addition to commissions on his annual receipts and disbursements to the tenant for life, to reasonable compensation for his services, trouble, and risk in collecting, investing, and managing the trust funds during the late civil war, when the responsibilities of his office were greatly increased by the anomalous condition of affairs, of which the court takes judicial notice.

5. *Solicitor's fees, and costs.*—This being the settlement of a trust, under a bill filed by the beneficiaries against the trustee, the litigation being protracted, and some of the contested items of account being decided against each party, the solicitor's fees and the costs were equally divided among the trustee, the beneficiary of the life-estate, and the remainder-men, one third to be paid by each.

## APPEAL from the Chancery Court of Marengo.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 23d December, 1873, by Mrs. Mary Jane Foscue and her two children, Ellen and Frank L. Foscue, against Francis L. Lyon; and sought an account and settlement of a trust created by the will of Augustus Foscue, deceased, who was the father of Mrs. Mary Jane Foscue. The bequest creating the trust was in these words: "I give and devise to Francis S. Lyon, in trust for the use and benefit of my daughter Jane, the wife of Frederick Foscue, the following named negro slaves," naming them; "for the sole and separate use, benefit, and support of my said daughter, for and during the term of her natural life, free and exempt from the control, possession, contracts, and obligations of her husband; and at her death to go, and be equally divided among her children. I, moreover, for the further use, benefit, and support of my said daughter, give and bequeath to the said Francis S. Lyon the sum of fifty thousand dollars in cash, out of my estate; to be by him as trustee invested in some safe and productive stock or stocks, or placed at interest on good security, as he may in his discretion deem best; the interest on the same he shall collect annually, or the dividends at such times as they may accrue, and pay over the same to my daughter Jane, for her sole and separate use and benefit aforesaid, so long as she may live; and in making such payments, the receipt of the said Jane to the said trustee shall be valid and binding, without her being joined by her husband; and at the death of the said Jane, the principal of the said sum of fifty thou-

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sand dollars shall by said trustee be settled upon and vested in the children of the said Jane."

Said F. S. Lyon was one of the executors of the testator's will, together with B. W. Whitfield; and they both qualified as executors on the 27th May, 1861, being exempted by the will from giving bond. On the 1st December, 1862, Lyon, as trustee, accepted from the executors, in payment of the legacy of \$50,000, the promissory note of G. Breitling for \$45,000, and the promissory note of Sledge & Compton for \$1,080; the amount due on the two notes, principal and interest, being computed as equal to the legacy, with interest thereon from the testator's death. Both of these notes were payable to the testator, and had been given for borrowed money. The Breitling note was secured by a deed of trust on two plantations, or tracts of land, called the "Calhoun place" and the "Lyon place," with a number of slaves, which were conveyed to said F. S. Lyon as trustee, who was authorized to sell for cash on default being made in the payment of the note. In December, 1865, the trustee took possession of the lands, and sold them at public outcry under the power contained in the deed, for one-third cash, and the balance in one and two years. At this sale, James R. Jones became the purchaser of the "Calhoun place," at the price of \$33,380, paying one-third cash, and giving his promissory notes for the residue, payable in one and two years, secured by a deed of trust on the land. In January, 1863, Jones having become insolvent and absconded, Lyon took possession of the lands, and had them sold under the deed of trust, becoming himself the purchaser. A material question in the case was, whether this purchase was to be considered as made for the benefit of the trust estate. On the 15th December, 1873, the trustee filed his resignation with the register in chancery, and made a settlement of his accounts and vouchers as trustee. The register allowed the account as stated by him, against the objections of Mrs. Foscue and her children, who thereupon filed the bill in this case, alleging that the trustee had failed to invest the legacy according to the directions of the will, and had failed to collect and pay over the annual interest; that he had no authority to invest any portion of the trust funds in the purchase of lands, as he claimed to have done, and that the trust estate was greatly injured by his neglect, mismanagement, and violation of official duty. The trustee answered the bill, denying all the charges of waste, negligence, or other misconduct, and giving a detailed statement of all his acts and conduct in the management of the trust estate.

The cause being submitted for final decree on pleadings



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and proof, at the June term, 1875, the chancellor held, that the complainants were entitled to an account of the trust estate from the trustee; that the trustee was authorized to receive the promissory notes from the executors, in satisfaction of the legacy; that in the purchase of the "Calhoun place," under the facts proved, in the name of the beneficiaries, and for their benefit, the trustee acted in good faith, and within the line of his duty; and the purchase was ratified and approved, and an account ordered to be stated by the register. The complainants appealed from this decree, and brought the case to this court, where an opinion was delivered, at its December term, 1876, partly affirming, and partly reversing the chancellor's decree, as shown by the report of the case—*Foscue v. Lyon*, 55 Ala. 440-58. This court decided, as the report of the case shows, that the trustee was authorized to receive the notes in payment of the legacy, and was bound to exercise due diligence in their collection; that in continuing the investment, and collecting the interest as it accrued, he acted with due diligence; that if the interest was collected in Confederate treasury-notes, and perished on his hands without fault on his part, he was not responsible for the loss; that his purchase of the lands, for the benefit of the trust estate, was not to be treated as a permanent investment, which he had no power to make, but a temporary expedient to prevent loss to the estate, which was approved and affirmed; and that he was not chargeable on account of his failure to sell the lands, a few days after his purchase, on the application of Siddons and others to purchase them from him. It was further held that the personal representative of Augustus Foscue, deceased, one of the children of Mrs. Mary Jane Foscue, was a necessary party to the bill; and the cause was remanded, "for further proceedings not inconsistent with this opinion."

After the remandment of the cause, the personal representative of said Augustus Foscue was brought in as a party by petition and amendment; and a special register having been appointed, at the June term, 1877, the chancellor made a decretal order, containing the following directions: 1. That F. S. Lyon, as trustee, "shall be charged with the *corpus* of the trust fund, to-wit, \$50,000." 2. That this fund shall bear interest from the probate of the testator's will. 3. That the interest arising from the *corpus* of the trust fund, year by year, shall be placed in a separate column, and be kept distinct from the *corpus*. 4. "That all Confederate money that died on the hands of trustee, without any fault on his part, shall be credited to him in the statement of the account; and in determining whether said money perished on his



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hands without fault on his part, the special register may hear testimony, and consider all the facts and surroundings." 5. That the special register shall allow no disbursement as a credit, unless supported by a proper legal voucher; and if it should appear that settlements have been made by the trustee with the Probate Court, the special register will entirely disregard them. 6. That, inasmuch as the Probate Court had no jurisdiction over the trust, "all fees paid on such settlements to the court, or to attorneys, shall not be a charge against the trust fund, but shall be borne by the trustee." 7. That former settlements made with the register, if not properly advertised and conducted, shall be disregarded by the special register, and disbursements then allowed shall be proved. 8. That the trustee "shall be charged with all interest on the *corpus* with which he may be shown to be properly chargeable, as it was duty to lend out the trust funds, and he could not convert himself into its mere custodian, burying it in a napkin." 9. "If it should appear that the trustee failed to loan out any part of the *corpus* of the trust fund, the special register will report the amount not put out at interest, and the proof on the point; also, whether or not Mrs. M. J. Foscue should be charged interest on such part of the *corpus* as she may have received from the trustee, where the failure of the trustee to loan out the *corpus* diminished her annual life-estate, and brought her in debt to the trust fund, without fault on her part." 10. That the rents collected from the "Calhoun place," after the purchase by the trustee, "shall stand for and represent the interest upon the *corpus* of the amount due from James R. Jones to the trust fund, up to the resignation of the trustee." 11. That the special register shall state in his report what amount of money Mrs. M. J. Foscue has received from the trustee, over and above the annual interest realized, or which, by due diligence, the trustee might have realized from the investment of the trust funds. 12. That the account shall be stated *de novo*, without reference to any former report made in the cause. 13. "That the trustee be charged with the trust fund, \$50,000, from the day on which he received it as trustee, subject to be abated to the extent of any Confederate money that perished on his hands without fault on his part; but the account shall clearly show these facts, together with the proper dates." 14. That the register append to his report an abstract of the proof on any point that may be contested before him, and on which either party may except to his ruling. 15. That the register report what would be a reasonable fee to be allowed to the solicitors of the trustee in defending this suit, and whether it should be

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paid by the owner of the life-estate, or by the remaindermen, and whether this suit was commenced before or after the resignation of the trustee.

To the report of the special register under this decretal order, made to the chancellor in July, 1877, exceptions were filed by both parties. The defendant's exceptions were—1st, the overruling of his motion for an allowance of \$2,750 as counsel fees; 2d, the refusal to allow him more than \$1500 as counsel fees; 3d, the refusal to allow him commissions as compensation for his services as trustee; 4th, the refusal to allow him any compensation for his services, trouble, and responsibility as trustee; 5th, the overruling of his motion for an allowance of five per cent. commissions on amount of *corpus* of trust fund received by him, and two and a half per cent. on amount disbursed. The complainant's exceptions were—1st, the allowance to the trustee of \$4,842.75, with interest thereon, "being amount of Confederate money received by him, less expenditures, &c., on the ground that the same had perished on his hands without fault on his part;" 2d, the action of the master in charging the trustee with only the amount of interest actually due on the Breitling note when he received it, instead of the amount actually collected by him; 3d, his action in charging Mrs. Foscue, in her account with the trustee, "with the difference between the amount paid by him to her during the year 1867, and the amount of interest actually collected by him that year," and his similar ruling in the account for each successive year; 4th, charging Mrs. Foscue with the sum of \$3,196.47, "as paid on the 6th December, 1869, as part of the purchase of the Calhoun plantation;" 5th, the refusal of the master to continue the account, year by year, to the 6th July, 1877, the day on which said account was closed;" 6th, the mode and manner of stating the account by the master, and the charges and credits therein contained, so far as shown by account No. 1 relating to interest," specifying the particulars; 7th, the statement of the account in reference to the amount received on the Breitling note in Confederate money, by which the *corpus* of the trust fund was reduced to \$45,157.25; 8th, "in reporting \$8,161.67 of *corpus* paid Mrs. Foscue, as being an overpayment." These various exceptions were stated in different forms, and with great detail, accompanied with the reasons urged in favor of them; but these matters can not be condensed within the limits of this report, and are not necessary to an understanding of the opinion of the court.

The cause being again submitted to the chancellor, on the report of the special master, and the several exceptions



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thereto filed by both parties, under an agreement in writing that he might render his decree in vacation, he delivered a most elaborate opinion, covering seventy-five pages of the transcript, accompanied with the following decree, which was rendered on the 17th, August, 1877 :

"1. It is ordered and decreed, that the exceptions filed by the defendant to the report of the special master be, and they are hereby, overruled and disallowed ; and it is ordered that the matter of fixing the fees of defendant's solicitors is reserved, until such time as the accounts shall have been confirmed by this court.

"2. It is ordered and decreed by the court, that the exceptions filed by complainants to the accounts, as stated before the special master, and to his report accompanying the same, be, and they are hereby, sustained.

"3. It is ordered and decreed by the court, that S. H. Sprott be, and he is hereby, continued as special register and master, to state the accounts necessary to be taken in this cause.

"4. It is ordered and decreed by the court, that F. S. Lyon, trustee as aforesaid, shall account to the tenant for life, M. J. Foscue, for the sum of \$3,196.27-100, alleged to have been invested in the Calhoun land ; and that the said trustee shall take an interest, to the extent of said sum of \$3,196.27-100, in the Calhoun land, and bear his proportionate share of the sale expenses, taxes, and improvements, as well as draw his proportionate share of the rents and profits of said land, since the sale made in December, 1869.

"5. It is declared and decreed by the court, that F. S. Lyon, trustee as aforesaid, had no legal right to receive Confederate money, it not being a 'legal tender' in this State by virtue of any law in force in 1863 ; and that he be charged with, and account for all sums received by him, as trustee, in such currency.

"6. It is declared and decreed by the court, that, inasmuch as F. S. Lyon, trustee as aforesaid, has deposed and stated that he could neither loan nor invest the Confederate notes or money collected by him in May, 1863, he is justly liable to account for said sum, upon the ground that it was his duty to have received a thing of value in satisfaction of debts due the trust fund.

"7. It is declared and decreed by the court, that F. S. Lyon, trustee as aforesaid, had no right, under the terms of the trust, to loan out the annual interest upon the capital or *corpus* of the trust fund ; and that he was guilty of a breach of trust, in loaning out the interest to Alf. and Samuel Breitling, on January 10, 1863, upon their individual due



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bill; and that he is justly liable to account to the tenant for life, in United States currency, for the interest so lent by him, and received in May, 1863, in Confederate treasury-notes or money.

"8. It is declared and decreed, that as the aforesaid trustee was guilty of *crassa negligentia*, in computing the interest on the G. Breitling note for \$45,000, for more than the legal time which was shown by the indorsement placed by Augustus Foscue on the back of said note, to be from March 1, 1861, the said trustee is liable to make good to the trust fund the loss of \$1,304.60, thereby occasioned, and that he shall be charged with such sum in U. S. currency, as, but for said *crassa negligentia*, the said sum could have been collected, in 1865, in Federal currency, from the estate of G. Breitling, which was amply able to pay said sum at that time.

"9. It is declared and decreed by the court, that in case F. S. Lyon, trustee, received from G. Breitling's executors *notes upon third parties*, in lieu of the cash due from them, after the sale of the mortgaged property, he is not entitled to be credited with any fees or costs for collecting said notes so taken, as it was his duty to have received *cash* from said estate of G. Breitling, or to have reclaimed the fees and cost of collecting said notes from said estate.

"10. It is ordered and decreed by the court, that F. S. Lyon, trustee as aforesaid, had no legal right to reduce the *corpus* of the trust fund, by making repairs and improvements on the Calhoun place, which he held for a *temporary purpose*; and that he is not entitled to a credit for moneys so laid out by him, without authority by the terms of the trust, or of this court.

"11. It is ordered and decreed, that all moneys, except \$3,500 paid October 27, 1868, to the tenant for life, in excess of the interest on the trust fund, are clearly shown to have been paid from mistake or ignorance of law, and voluntarily, and without solicitation, fraud, or imposition, on the part of the tenant for life; and that this court cannot compel said tenant for life to repay such moneys, as the obligation to do so is enforceable only in *foro conscientie*.

"12. It is declared and decreed by the court, that any promise made by the tenant for life, in her answer to the cross bill of the trustee, to repay and account for the *corpus* paid her, was executory, and revocable at any time, and is not enforceable by a decree of this court, however strong the obligation of repayment may be in *foro conscientie*.

"13. It is ordered and decreed, that M. J. Foscue is justly accountable to the trustee, F. S. Lyon, for the sum of \$3,500, paid 27 October, 1868, together with interest; she having

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been aware said sum composed a part of the *corpus*, and having agreed in writing to refund the same.

"14. It is ordered and decreed, that proof may be made before the special register, as to whether or not said trustee could, by the use of due diligence, have collected the first note of J. R. Jones for the purchase-money of the Calhoun place, from the crops grown on the place, or from the personal security, M. W. Creagh; and as to whether said trustee is not bound to make good to the trust fund all such moneys as he might, by reasonable diligence, have collected at the maturity of said note, and in consequence of his neglect to sue on said first note, or to attach the crops grown on the place.

"15. It is declared and decreed, that the trustee, F. S. Lyon, was properly charged by the special register on so much of the *corpus* of the trust fund as he kept on hand, uninvested, and that he be so charged in any future account that may be stated by said special master.

"16. It is ordered and decreed by the court, that, in stating said account, no interest shall be charged on the commissions due the trustee each year, and that no annual rests be allowed in computing interest.

"17. It is ordered that all interest, whether upon debits or credits, shall be computed on each amount, by itself, and placed immediately under the particular item, so as to show each amount separately.

"18. It is declared and decreed by the court, that, in case the trustee should be decided to be entitled to a credit for Confederate money, he is only entitled to the amount claimed in his account of 1873, viz., \$3,345.38; provided, the \$1,304.10 be not included in said sum, as he is chargeable with said \$1,304.10.

"19. It is ordered and decreed, that the accounts stated by the special register do not conform to the directions heretofore given by this court, as to how they should be stated, and that, consequently, a new reference is made necessary to the said special master, in order to a correct statement of the same.

"20. It is ordered and decreed by the court, that in executing the reference hereby ordered, the special register shall follow strictly the instructions and directions contained in this interlocutory decree, and shall not hear any testimony, except on the matters expressly pointed out in this decree.

"21. It is ordered and decreed by the court, that no credit for the disbursement of funds shall be allowed by the special register, unless it be supported by a legal voucher, and that the *receipt* of the party to whom money is alleged to have

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been paid is necessary to be filed by the trustee, before he can be allowed a credit therefor.

"22. It is ordered and decreed by the court, that the account of the *corpus* shall not contain any matters of interest, on either side of said account, and that the trustee shall be credited with \$22,568.66, and the expenses of sale for the Calhoun place, and with no other reductions of said *corpus*, from the time that he took charge of it.

"23. It is ordered and decreed by the court, that the accounts stated by the special master, in all matters and items not specifically pointed out as erroneous, in and by this decree, shall be transferred by the special master to his new accounts, just as they stand on the accounts now set aside and referred back to him.

"24. It is ordered and decreed by the court, that, inasmuch as the trustee is under no bond as such, and as the account, as stated by the special register, shows a balance of trust funds still in his hands, on which interest is due from 1873, said trustee, in case he prosecutes an appeal to the Supreme Court, shall file with the register a good *supersedeas* bond, in the sum of fifteen thousand dollars."

On the re-statement of the account by the special master, under this reference, three exceptions were reserved to his rulings by James M. Curry, as administrator of the estate of Augustus Foscue, deceased, and eighty exceptions were reserved by the trustee; and on the coming in of his report, the chancellor, on the 3d November, 1877, rendered the following decree, in connection with a written opinion, in which he reviewed the whole case, and gave his reasons for the several conclusions announced in his decree:

"1. It is ordered, decreed, and adjudged by the court, that the exceptions filed by the defendant to the account and report, from 1 to 80 inclusive, are not well taken, and are hereby overruled and disallowed.

"2. It is ordered and decreed, that the trustee is not chargeable with compound interest, and the same must be corrected, if done.

"3. It is ordered and decreed, that the trustee is entitled to full commissions, as fixed by law, where he has not heretofore received them; but, as he has not made annual settlements, such commissions ought not to be allowed annually, but should be placed in bulk in the account.

"4. It is ordered and decreed, that all the credits on the present account, together with the vouchers for State and county taxes for 18—, shall be allowed, as of course, in any future account that may be stated of said trusteeship.

"5. It is ordered and decreed, that the trustee is entitled



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to one-third of a reasonable fee for his solicitors, but not to exceed \$650, to be paid out of the trust fund.

"6. It is ordered and decreed, that J. M. Curry, administrator of Augustus Foscue, deceased, not having been a party nor a privy to this suit or proceeding in June, 1875, is not bound by the original decree rendered in this cause at the June term, 1875, and is entitled of right, at this stage of the cause, to have the aforesaid decree of 1875 set aside as to him.

"7. It is ordered and decreed by the court, that exceptions — filed by said Curry, administrator of Augustus Foscue, are well taken, and are hereby sustained.

"8. It is declared and decreed, that the purchase of the Calhoun plantation, by the trustee, F. S. Lyon, is shown by the facts and the pleadings to have been a permanent investment of the trust fund, contrary to the terms of the trust, and without authority of law.

"9. It is declared and decreed, that F. S. Lyon, trustee, kept off purchasers, and created the necessity for himself bidding in the Calhoun land, by requiring the purchase-money, amounting to \$26,800, to be paid in cash on December 10, 1869, when no necessity or valid reason existed for his imposing such restriction and embargo on the sale.

"10. It is declared and decreed, that F. S. Lyon, trustee, *converted* the purchase of the Calhoun plantation into a permanent investment, by his refusal of the offer, made shortly after his said purchase, to take the same off his hands at his bid, paying one-third cash, and giving a mortgage for the residue of the purchase-money.

"11. It is declared and decreed, that F. S. Lyon, trustee, converted the purchase of the Calhoun plantation into a permanent investment, contrary to the terms of the trust, by failing for four years to offer said plantation for re-sale, as was his duty under the terms of the trust, forbidding the investment of the trust fund in real estate, and by failing to report said purchase and ask for a ratification and directions as to its management and sale, as a temporary investment of the trust fund.

"12. It is declared and decreed, that the trustee aforesaid converted the purchase of the Calhoun plantation into a permanent investment of the trust fund, contrary to the terms of the trust, and without authority of law, by erecting and making permanent improvements upon said plantation, out of the trust fund, without any order of the proper court, as well as by treating and dealing with said plantation as if it was a permanent investment of the trust fund.

"13. It is declared and decreed, that the trustee, by his

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conduct, converted the purchase of the Calhoun plantation into a permanent investment of the trust fund, contrary to the terms of the trust, and without authority of law.

"14. It is declared and decreed, that the neglect of the trustee to collect by legal process the first note of J. R. Jones when it fell due, and his giving time and indulgence to said Jones, created the necessity, if any such existed, for the purchase of the Calhoun plantation for the trust fund.

"15. It is decreed that the facts in the cause show that no necessity existed for the trustee to purchase the Calhoun plantation, even temporarily, to save a loss to the trust fund, and that in purchasing without such necessity, the aforesaid trustee made a permanent investment of the trust fund in real estate, contrary to the terms of the trust, and without authority of law.

"16. It is ordered and decreed by the court, that special master Sprott is entitled to a fee of \$130, in addition to previous allowances, to be paid out of funds in the hands of the receiver of the trust fund; and that such receiver shall pay the said sum out of any trust funds he may have on hand; and that the receipt of said special master Sprott shall be and constitute a proper voucher for said receiver in his settlement of his said receivership.

"17. It is ordered and decreed that, in any future account that may be stated, the trustee shall take the Calhoun plantation, and the rents upon it since December, 1869, and account to the complainants for the sum of money invested in the Calhoun plantation, and interest thereupon, without, however, compounding such interest.

"18. It is ordered and decreed that, in the event of an appeal being prosecuted by the defendant, as he is under no bond as trustee, that the *supersedeas* bond be, and the same is, fixed at the balance reported by special master Sprott, in his last report, due from said trustee to the beneficiaries.

"19. It is ordered and decreed, that the report under consideration be, and the same is set aside, and a new one ordered to be made in conformity to this decree, by S. H. Sprott, Esq., who is re-appointed special master in this cause."

The defendant now appeals from this decree, and here assigns as error the two decrees rendered, respectively, on the 17th August, and the 3d November, 1877, together with each separate ruling of the chancellor in the instructions to the special master, and in his rulings on the exceptions to the two reports of the master; the assignments of error being *one hundred and forty-eight* in number.

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PETTUS &amp; DAWSON, and W. E. &amp; R. H. CLARKE, for appellant.

W. W. DUGGER,\* *contra*.

STONE, J.—This case was before this court, and was decided at the December term, 1876. We then very explicitly laid down rules, which were intended to settle, and did settle, all the material questions in this cause, except those hereafter stated. In some respects, we reversed the ruling of the chancellor, and declared the principles which should govern in the settlement of those questions. In other respects, we affirmed the chancellor's rulings. We reversed the decree of the chancellor, and remanded the cause, "for further proceedings not inconsistent with this [that] opinion." All the principles we declared in that cause, we intended should be rules for the after conduct of the litigation. We intended to make, and thought we had made, ourselves understood. We did not expect our rulings to be disregarded, and the same questions we thought we had settled, to be returned upon us, not only with our own directions overruled, but with that part of the chancellor's decree which had been affirmed by us, itself reversed by the same chancellor who pronounced it. With limited exceptions, this court has appellate jurisdiction only; and it is, as its name imports, a Supreme Court, or court of last resort. It is clothed with "a general superintendence and control of inferior jurisdictions." We regret the necessity we feel ourselves under of announcing this wholesome principle, which seems not to be understood.—*Johnson v. Glasscock*, 2 Ala. 519. We adhere to our former decision in this cause, and hereby reverse all that is found in this record, inconsistent therewith. On these questions, we deem it unnecessary to elaborate this opinion. The chancellor seems to have fallen alike into errors of fact and of law.

In our former decision, we approved the trustee's investment of the fifty thousand dollars, pecuniary legacy, in the Breitling note and mortgage, and the other claim mentioned. The civil war was then raging, and, viewed from any standpoint, we do not think a wiser or safer investment could have been made. So, we approved the sale to Jones, and the subsequent sale and purchase of the lands for the benefit of the trust estate. We think it is shown, with reasonable certainty, that the trustee's purchase then appeared to be the best that could be done for the interest of the beneficiaries.

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\* The arguments of counsel are very full, and can not be condensed within suitable limits for publication, being mainly addressed to the voluminous matters of account.



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Infallibility is not exacted of trustees. They must form their best judgment in the light of existent facts, and, if they act in good faith, are not responsible for results which ordinary vigilance and prudence could not foresee. Others, it is shown, were willing to give near the same sum; but the trustee believed the lands worth the entire debt, and he was not willing they should be sold away from the beneficiaries, at a sum less than the entire demand. It is not shown that others offered to take the bid off his hands, to be paid in three installments. Lyon purchased on the 6th December. Five days afterwards, on the 11th, title was made to him for the benefit of the trust estate. A week or two—(more than five days)—after the sale and purchase, Siddons and others had an interview with Lyon, for the purpose of proposing to take the purchase off his hands, to be paid in the three installments. Lyon informed them he had let the lands to rent for the next year. Thereupon, the negotiation ceased, and it is not shown whether any offer was in fact made. Before the interview, as far as we can learn, Lyon, in ignorance of their wish to purchase, had leased the lands to Buford, and thus placed it out of his power to deliver immediate possession. The witness Selden, one of the negotiating parties, testifies that the interview took place about a week after the sale. The language of this witness is: "I knew of no agreement, or conclusion. The reason it was not carried out was, that the land had been rented to one Buford, before we could get an interview with Mr. Lyon. That was my understanding." Mr. Siddons, another of the negotiators, says the interview was a week or two after the sale. His language is, "As soon as we learned that Mr. Lyon had rented the place, we abandoned all idea of purchasing." Dr. Dugger, the other proposed purchaser, was not examined. Mr. Lyon, in his deposition, after stating that Messrs. Siddons, Dugger, and Selden, had reminded him of the interview, says, "My recollection as to these facts is not distinct." He neither proves nor disproves that these parties offered to take his purchase off his hands. We have said this much, because much stress is laid on the fact that Lyon refused to allow these parties to become the purchasers of the Calhoun plantation, and thereby, as it is contended, injured the trust estate very seriously.

The present trust originated in 1861. It came to the hands of the trustee in 1862. Our civil war was then raging with terrible earnestness. The blockade cut off intercourse from without, while the value of all stocks and moveables within Confederate lines was dependent on the result of the gigantic struggle. The wisest could then have found no

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safer investment, than a personal loan, secured by mortgage on valuable real estate. Slaves were then also considered good security; for the Southern people, in their zeal and heroic hopefulness, generally believed we would achieve a separate Federal government. The philosophic and calculating could not fail to know that all stocks and attainable personal investments hinged on the fate of the war. Nothing promised so good and lasting security as a pledge of real estate. Surveying the surroundings, we think Mr. Lyon elected the best possible investment of the trust fund confided to him. The war ended, and the star of Confederate hope went down forever. We had been the wealthiest agricultural people in the world. We soon came to be numbered among the poorest. Two and a half to three thousand millions of personal property, deemed, at the time, the most valuable of Southern acquisitions, were struck down by an edict as relentless as the torch of Omar. Unprecedented shrinkage of values supervened, and affluence gave place to gaunt poverty. Viewed from any period since the war, results have vindicated the wisdom of Mr. Lyon's choice; and few trust funds have been carried so successfully through the ordeal of fire, through which it was doomed to pass. Not a shadow of suspicion rests, or is attempted to be cast, on the purity and integrity of the trustee, during the long and trying period of his ministration; not a semblance of self-seeking, or personal aggrandizement. The law deals generously with trustees, who have acted in good faith. "Well done, good and faithful servant," is the language of Him "who spake as never man spake."—*Gould v. Hayes*, 19 Ala. 438; *Henderson v. Simmons*, 33 Ala. 291.

In the chancellor's decretal order of June 21, 1877, he followed substantially the rulings of this court, when this case was formerly before us. We find nothing in that order upon which we consider it necessary to comment. So, we approve the report of the special register, first made, with the exception of certain points hereafter considered, and, to the extent named, confirm the same. The decrees of August 17, 1877, and of November 30, 1877, together with the instructions to the special register of the first named date, were unauthorized, and are reversed and annulled.

Under the terms of the trust, it was the duty of the trustee to collect the interest annually, and pay it to Mrs. M. J. Foscue. This he attempted to do. In the first calculation of interest, January 10th, 1863, he collected on the Breitling note near four thousand dollars more than was then due, of accrued interest. This collection was made in Confederate money, and part of it was paid to Mrs. M. J. Foscue, on her



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claim of interest on the fifty thousand dollars trust fund. If the whole payment then made in Confederate money be allowed as a credit on the note, the effect will be to reduce the principal to between forty-one and forty-two thousand dollars, as of January 10th, 1863. Taking this as a basis of calculation, and allowing credit for all the payments afterwards made, and accounted for by Mr. Lyon, the balance of the note would be fully realized, with a probable *residuum* of more than three thousand dollars, overpayment. On the other hand, if we treat the Confederate payment of January 10th, 1863, as only paying the interest up to that time, and leaving forty-five thousand dollars of principal then due on the Breitling note, and drawing interest from that date, then the payments afterwards made and accounted for by the trustee fell short of paying the note in full by about the sum of \$2,063 at the time of the last payment, 23d day of February, 1870. In making these calculations, we have taken the credits, both as to amounts and dates, from the admission of the parties, made and found in connection with the testimony of Sharpe, the expert, given, or offered, on the last trial before the special register. The additional collections, mentioned in the testimony of Sharpe, are also set forth in the report of the trustee, sworn to and filed December 15th, 1873, and made part of the evidence in this cause.

In the Confederate collection of January 10th, 1863, it was the intention of the trustee to collect the accrued interest on the Breitling note, and only the accrued interest. By an oversight, or mistake, for which no excuse can be offered which meets the requirements of the law, he collected more than the interest, and therefore more than he intended to collect. If he had not made this excess of collection, he would have realized, in good money, the balance of the note—some \$2,063—as of 23d day of February, 1870. This entailed a loss of about \$1,208 in the *corpus* of the trust fund, and the residue of the said sum of \$2,063 in the interest collected in good money. While not a shadow of suspicion is cast on the personal uprightness of the trustee, the law exacts of him more than purity of purpose. He must bring to the service diligence; that degree of care and diligence, which an ordinarily prudent man bestows on his own affairs. Tested by this standard, the trustee can not be pronounced legally blameless in the loss of this part of the trust fund, and he must account for it.

But, with watchfulness and much prudence, he carried this fund through the trying ordeal of our late civil war. In this, as we have shown, he performed a hazardous trust, and he was necessarily put to trouble, and required to exercise



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skill, first, in collecting the Breitling and D. Compton claims, and, second, in the suits and collections from Jones, the purchaser of the Calhoun plantation. These, together with the necessary account and settlement of the trust, he is entitled to have considered in the adjustment of his accounts. He has been allowed commissions for receiving and disbursing the interest on this fund. He has had no allowance for receiving, carrying and settling the *corpus* of the trust. Without further embarrassing or delaying this litigation, we think a proper allowance to be made the trustee in this case is about the sum we have shown was lost, by the error committed in calculating interest. We therefore set off one against the other, and adjudge that neither be noted in the account.

The balances found and reported by the register, included interest up to the 15th day of December, 1873. There was then due from the trustee, of the *corpus* of the fund, \$13,665.03. And there was due from Mrs. Mary J. Foscue, to the trustee, for overpayment to her, the sum of \$8,161.67. These are to be the *data* of the final decree, subject to the changes in their several sums, to be produced by the result of the account for professional services, &c., hereinafter ordered. This simplifies the account, and the final disposition of this cause, so that it will be difficult to err in the consummation. We shall hereafter show, there is but a single question left open, and that a *quantum meruit*, to be determined on proof. And if the sum paid to the register by Mr. Lyon, when he tendered his resignation, has not been included in the former account, or he has not otherwise had the benefit of it, the special register will allow that to the trustee also. We have not been able to determine whether this has been allowed or not.

In the conduct of this litigation, many claims have been preferred against the trustee, which have been disallowed. Some have been allowed. Counsel fees and costs have necessarily been incurred in the very severe litigation to which this settlement has been subjected. Some errors of claim have been committed on each side; a decided majority on the side of complainants. We think the compensation to the trustee's solicitors, and the costs in the court below, should be divided into three parts; one-third to be paid by Mary Jane Foscue, one-third by the remaindermen, and the remaining third by the trustee, Lyon. We feel, however, unable to determine, in the present state of the record, what should be a proper allowance to the solicitors. It should be a reasonable and customary charge for the services rendered. Since the testimony was taken, bearing on that question, and

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since the report of the register thereon was made, a second laborious and protracted contest has been had before the register, and a second appeal to this court has been rendered necessary. These services should enter into the account of solicitor's fees. We order a reference to the special register on the single question of a proper allowance for the services of the trustee's solicitors; and in taking such account, the register will be allowed to consider all the testimony taken, bearing on that question, and any other legal evidence that may be offered; and he may re-examine witnesses heretofore examined, if desired. One-third of the sum he may so find and report, he will deduct from the balance of the *corpus* of the trust fund, found in the hands of the trustee, and one-third he will add to the balance of overpaid disbursements made by the trustee to Mrs. Mary Jane Foscue. He will take as the basis of this part of his report, the balances found and reported by the special register, filed of date June 5th, 1877; and when those balances are thus corrected, and interest computed to the coming in of the report, he will report his findings to the Chancery Court, to be there acted on by the chancellor, as other reports made to him are.

When these balances are thus ascertained by the report of the register and its confirmation, then, if Francis S. Lyon gives an order to Ella Foscue, F. L. Foscue and James M. Curry, administrator of Aug. Foscue, for the balance found due from Mary J. Foscue—the order to be drawn on Mary J. Foscue—the balance found against the trustee of the *corpus* of the trust fund is to be credited with a corresponding sum; and the balance found against the trustee, after allowing this credit, is to be the decree in favor of the remaindermen against the trustee. This under the agreement filed of record June 19th, 1877. This is the sole question left open for decision by the chancellor, in accordance with the rules above declared.

Let the costs of this appeal be paid by the appellees, and the costs of suit in the court below be divided into three equal parts, and taxed as above directed.

[Albrittin v. Mayor and Aldermen of Huntsville.]

## Albrittin v. Mayor and Aldermen of Huntsville.

### *Action for Damages against Municipal Corporation.*

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| 68 | 149 |
| 84 | 474 |
| 92 | 355 |

1. *Judicial notice of charter.*—The charter of a municipal corporation is a public statute, of which the courts will take judicial notice.

2. *Municipal corporation ; when action lies against, on account of injuries caused by defective streets or side-walks.*—To render a municipal corporation liable, in a civil action, for special injuries caused by defective streets or side-walks, it is not necessary that the duty of keeping its streets and side-walks in repair shall be expressly enjoined by its charter, or any other public statute : the duty and liability arise, when the charter confers express power to open, improve, repair, and keep the streets, &c., in safe condition for travel, and additional power to raise the necessary funds for that purpose, by taxation or assessments ; and an action lies in favor of a person who is injured by the neglect of this duty, when he did not bring the accident upon himself by his own culpable negligence, and the defect in the street or side-walk had existed, within observation by the people generally, for such length of time as must have enabled it to be known.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by James H. Albrittin, against the mayor and aldermen of the city of Huntsville ; and was commenced on the 19th November, 1877. The complaint was in these words :

“The plaintiff claims of the defendant, a municipal corporation under the laws of said State, twelve thousand dollars, as damages, because the defendant failed to do its duty, and erect and put up a barrier, railing, or guard, along the north side of Spring street, a public highway in said city, and south of, and opposite the ‘Huntsville Hotel,’ to prevent travellers and pedestrians from falling from the street or side-walk, over a precipice, or declivity, there being and situated, about the distance of eight feet, to the basement or foundation of said hotel ; whereby the plaintiff, who did not know of the existence of said precipice, in consequence of the said negligence of the defendant, on the night of the 15th of November, 1876, necessarily and unavoidably fell from said street, over said precipice or declivity, without fault of the plaintiff, and broke his leg, so that it had to be, and was, on the 16th of November, 1876, cut off above the knee.

2. “Plaintiff claims of defendant twelve thousand dollars damages, because it was, and is, the duty of the defendant to keep the streets of said city in repair, and to put up guards



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or railings, and, at night, to keep lights burning, opposite and near to any precipice, or dangerous declivity, in and contiguous to the streets and side-walks of said city. On the north side of, and contiguous to Spring street, which was, at the time of the grievances herein alleged, and now is, a public street and highway of said city, for all persons to pass and repass, go and return upon, there was, and has been for several years, and now is a dangerous precipice or declivity, opposite to which the defendant had, knowing the existence and situation of said precipice or declivity, wrongfully and negligently failed and refused to put any guard or railing, and near to which the defendant had failed to have any or sufficient lights to show and expose said precipice or declivity. The plaintiff, who did not know of the existence of said precipice, on the night of the 15th of November, 1876, while passing along said Spring street, on foot, in consequence of the said negligence of the defendant in failing to place guards or railings between said precipice or declivity and said street, unavoidably and necessarily fell from said street, to the bottom of said precipice, a distance of about six feet, and by such fall broke his leg, so that it had to be, and was, amputated above the knee on the following day ; and he, the said plaintiff, became and was sick, sore, lame, diseased, and disordered, and remained and continued for a long space of time, *to-wit*: from thence, hitherto, during all which time the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted : and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend, a large sum, *to-wit*: the sum of two thousand dollars, in and about endeavoring to get healed and cured of the said wounds, sickness and disorder ; and was also, by means of the premises, forced and obliged to pay and expend, and did pay and expend a large sum, *to-wit*: two thousand dollars for board, lodging, and attention while so confined by said injuries ; and was also forced to expend, and did expend and pay out, a large sum of money, *to-wit*: two thousand dollars, in bringing a suit against said defendant for said injuries ; and was also forced to pay out and expend a large sum of money, *to-wit*: two thousand dollars, to have the business and work of the plaintiff done, which plaintiff was by the premises rendered unable to do ; and he, the plaintiff, was, also, put to great damage and loss, *to-wit*: the sum of twelve thousand dollars by reason of the premises. Whereby the plaintiff, for all the time of his future life, was made less able to support and

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maintain and care for himself. Therefore plaintiff sues," &c.

3. "And the plaintiff claims of the defendant, a municipal corporation under the laws of Alabama, the further sum of twelve thousand dollars, because it was and is the duty of the defendant to keep the streets of said city in repair, and to remove, take away from, and prevent obstructions being upon the same, and to put up guards, barriers, and railing, and at night to keep lights opposite and near to any precipice or dangerous declivity in and contiguous to the streets and side-walks of said city, unknown to the plaintiff. On the side-walk, on the north side of Spring street in said city, which street and side-walk were at the time of the grievances herein alleged, and now is a public street, side-walk and highway of said city, for all persons to pass and repass, go and return upon, there was and has been for more than one year an obstruction or impediment, consisting of the end of a platform, which rests upon the side-walk and street, which blocks up, and makes said side-walk impassable, and prevents travellers from walking on said side-walk, and forces them to walk in said street, on north side of which, and contiguous to the same, there was and has been for one year, and now is a dangerous precipice, or declivity, opposite to which the defendant had, knowing the existence and situation thereof, and knowing the situation of said platform or impediment on said side-walk, wrongfully and negligently failed and refused to put any guard or railing, and near to which defendant failed to put any lights to show and expose said precipice and declivity; and the said defendant, knowing the existence and situation of said platform, or impediment, refused to remove, and permitted the same to so remain, knowing that said platform, or impediment, would force travellers to walk near to and over said precipice. The plaintiff, on the night of the 15th of November, 1876, while lawfully passing and walking along said Spring street, in consequence of said negligence of the defendant, in failing to remove the end of said platform or impediment from said side-walk, could not walk thereon, and was forced to walk in said street; and, in consequence of the said negligence of the defendant in failing to place guards, railings, or barriers, at and on the edge of said street, between said street and said precipice, or declivity, he, the said plaintiff, necessarily and unavoidably fell from said street, to the bottom of said precipice or declivity, a distance of about six feet, and by such fall broke his leg, so that it had to be, and was amputated above the knee, on the following day; and he, the said plaintiff, became and was sick, sore, lame, diseased, and disordered, and remained and continued for a long space of time, to-wit: from thence hitherto,



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during all which time the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted; and was also, by means of the premises, forced and obliged to pay, lay out, and expend, and did pay, lay out, and expend, a large sum, to-wit: the sum of two thousand dollars, in and about endeavoring to get healed and cured of the said wounds, sickness, and disorder; and was also, by means of the premises, forced and obliged to pay out and expend a large sum, to-wit: two thousand dollars for board, lodging and attention, while so confined by said injuries; and was also forced to expend, and did expend and pay out, a large sum of money, to-wit: two thousand dollars, in bringing suit against said defendants for said injuries; and was also forced to pay out and expend a large sum of money, to-wit: two thousand dollars, to have the business and work of the plaintiff done, which plaintiff was by the premises rendered unable to do; and he, the plaintiff, was also put to great damage and loss, to-wit: the sum of twelve thousand dollars, by reason of the premises, whereby the plaintiff for all the time of his future life was made less able to support and maintain and care for himself. Therefore plaintiff sues," &c.

The defendant demurred to the whole complaint, and to each count thereof separately, assigning several causes of demurrer. The court sustained the demurrer, deciding, as the judgment recites, "that the defendant is not liable, because there is no duty imposed on the defendant to keep the streets of said city in repair, or to put up guards or barriers, in cases, and under circumstances as alleged in the complaint." The judgment on the demurrer is now assigned as error.

WALKER & SHELBY, for appellant.—It was not necessary to set out the charter of the defendant corporation, since the court will take judicial notice of it.—*Smoot v. Mayor of Wetumpka*, 24 Ala. 112; *Perryman v. Greenville*, 51 Ala. 507. An inspection of the charter shows that the corporation is invested with very full and ample powers in the premises—the power "to declare, prevent, and remove nuisances;" "to erect and repair bridges;" "to construct drains and sewers, and keep them in repair;" "to keep in repair the streets, avenues, and alleys of said city;" "to discontinue and close them when expedient;" "to widen or change their direction, and to open new ones;" "to pave, gravel, macadamize, or otherwise improve any street, or part thereof;" and to provide the necessary funds for these several purposes, by tax-



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ation, or assessments against persons or property. And, in addition to these powers, expressly conferred by its charter, the general statutes confer on all municipal corporations the power to "keep in repair all necessary streets, alleys, and drains, and to adopt regulations necessary for the same;" and make it a misdemeanor, on the part of the officers of the corporation, to suffer the streets to be out of repair for more than ten days at one time.—Code of 1876, §§ 1782, 1667, 4248. From these various statutory provisions, special and general, the duty to keep the streets in repair arises by necessary implication, although the charter does not expressly declare, as in the case of *Smoot v. Mayor of Wetumpka*, 24 Ala. 112, "the streets and highways of said city shall be kept in repair by said city." Although the language of the charter may be, grammatically, only permissive, yet it is legally peremptory; for, "where power is given by statute to public officers by permissive language—as that they 'may, if deemed advisable,' do a certain thing—the language used must be regarded as peremptory, when the public interests, or individual rights, require that it should be."—*Supervisors v. United States*, 4 Wallace, 435. When the duty of keeping its streets and side-walks in safe condition is enjoined upon a municipal corporation by express words, or arises from a fair construction of its charter, there is a corresponding liability for a breach of that duty, by which any person suffers special damage; and this now seems to be the general doctrine, as laid down in the text-books and adjudicated cases.—Dillon on Municipal Corporations, 754-6; Wharton on Negligence, §§ 950, 975-6; Shearman and Redfield on Negligence, § 391, and notes; *Barnes v. District of Columbia*, 1 Otto, 551; *Nebraska v. Campbell*, 2 Black, U. S. 590; *Weightman v. Corporation, &c.* 1 Black, 39; *Robbins v. Chicago*, 4 Wallace, 658; *Mayor v. Sheffield*, 4 Wallace, 194; *Conrad v. Ithaca*, 16 N. Y. 158; *Storrs v. Utica*, 17 N. Y. 104; *Sparhawk v. Salem*, 1 Allen, 30; *Bill v. Norwich*, 39 Conn. 222; *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. Rochester*, 45 N. Y. 129; *Barton v. Syracuse*, 36 N. Y. 54; *Browning v. Springfield*, 17 Illinois, 143; *Claybury v. Chicago*, 25 Illinois, 535; *Springfield v. Le Claive*, 49 Illinois, 476; *Jones v. New Haven*, 34 Conn. 1; *Mearns v. Washington*, 9 Ired. 73; *Anne Arundel County v. Duckett*, 20 Md. 468; *Pittsburg v. Grier*, 22 Penn. 54; *Erie City v. Schwingle*, 22 Penn. 388; *Cook v. Milwaukee*, 24 Wisc. 270; *Ward v. Jefferson*, 24 Wisc. 342; 17 Grattan, 241, 375; *Western College v. Cleveland*, 12 Ohio, 377; *McCombs v. Akron*, 15 Ohio, 476; *Rhodes v. Cleveland*, 10 Ohio, 159. The following English cases sustain the same doctrine: *Mayor v. Henley*, 2 Cl. & F.

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331; *Mersey Docks v. Gibbs*, 1 House of Lords Cases, 93; *Scott v. Mayor*, 37 Eng. Law & Eq. 465; *Canal Co. v. Parnaby*, 11 Ad. & El. 223.

BRANDON & JONES, with whom was N. DAVIS, *contra*.—1. In the United States, there is no common-law obligation resting on corporations, to repair highways, streets, or bridges, and they are not obliged to do so, except by force of some statute.—*Williams v. Mayor*, 1 Denio, 595, 600; *Cole v. Medina*, 27 Barbour, 218; *Peck v. Batavia*, 32 Barbour, 634, 643; *Carr v. Northern Liberties*, 35 Penn. 324-30; *Smoot v. Mayor of Wetumpka*, 24 Ala. 112; *Shear. & Redf. on Negligence*, §§ 124-28, 346.

2. This doctrine applies to counties also; as to which, it has been repeatedly held, that they are not liable to a private action, at the suit of individuals who receive injuries, on account of neglect to keep the roads in repair.—*Barbour County v. Browder*, 36 Ala. 366; *Covington County v. Kinney*, 48 Ala. 566; *Sims v. Butler County*, 49 Ala. 110; *Dargan v. Mayor and Aldermen of Mobile*, 31 Ala. 469; *City Council v. Gilmer*, 33 Ala. 116; *Fowle v. Alexandria*, 8 Curtis, 460; *Riddle v. Proprietors, &c.*, 7 Mass. 169-86; *Marr v. Leicester*, 9 Mass. 237; *Sussex v. Straddler*, 3 Harr. 108; *Detroit v. Blakeley*, 21 Mich. 184, 112; 2 Kent, 274; *Dillon on Municipal Corporations*, 786. As to duties imposed on them, counties stand on the same footing as municipal corporations proper.—24 Ala. 112.

3. Even when the legislature enjoins this duty on corporations, the decisions treat it as a public, and not a corporate duty; and they are not liable to be sued civilly for damages, caused by their neglect to perform this duty, unless the action is expressly given by the statute.—*Dillon on Mun. Corp.* §§ 747, 717; *Marr v. Leicester*, 9 Mass. 247; 25 Ala. 461.

4. In the New England States, the liability is not implied, but statutory.—*Dillon, M. C.* §§ 747-8; 7 Mass. 9; 9 Mass. 248; 3 Cush. 121; 6 Cush. 141; 8 Cush. 554; 7 Gray, 421; 13 Gray, 59; 102 Mass. 489; 17 Conn. 475; 22 Maine, 114; 20 Maine, 246; 32 Maine, 536; 36 Maine, 393, 521; 2 N. H. 392; 36 N. H. 284; 27 Vermont, 443. These statutes impose on towns the duty to make their ways safe and convenient, and give an action for injuries caused, to person or property, by any defect or want of repair.

5. A municipal corporation is not liable to a private action for negligence in the performance of its duties, unless the duties imposed are imperative.—*Smoot v. Mayor of Wetumpka*, 24 Ala. 112; *Cole v. Verbena*, 27 Barbour, 218; *Peck*

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*v. Batavia*, 32 Barbour, 634; *Carr v. Northern Liberties*, 35 Penn. 324.

6. There is a marked difference between the New England statutes, the Alabama statute, and the charter of Huntsville. In New England, the statutes impose the duty on towns. In Alabama, the county commissioners are vested with a discretion in the premises. The charter of Huntsville does not impose any duty on the city, except to collect a street tax, and confers on the authorities power to allow parties, who are amenable to such a tax, to discharge it by working on the streets, and to require that taxes, collected in new portions of the city, be appropriated to the benefit of those portions; and these duties are not imposed in imperative terms, but only in terms which confer a discretion.—Charter of Huntsville, §§ 22, 23; Code of City Laws, §§ 67, 91, 143-48.

MANNING, J.—This suit was brought by appellant, for damages for the wounds, suffering, loss of time, and expense, to which he was subjected, by a fall of about six feet in the night time, while walking in one of the public streets of Huntsville, down a precipice, or walled place, the upper part of which was on a level with the street, or foot pavement on the side thereof, and without a railing or other barrier, or any light burning near it. to prevent persons who, like him, did not know of its existence, or should not see it, from being precipitated down the descent. By the fall, it is alleged, appellant's leg was broken, and had to be afterwards amputated; from which, and the bruises he received, resulted great pain, sickness, long confinement, and expense, and also the inability and injury of being a cripple for life. It is alleged that it was defendant's duty to have had such railing, barriers, or other safeguards, erected along said precipice, to prevent accidents thereby; that it had existed in the dangerous condition it was then in, for a year or more before appellant's fall; and that, notwithstanding its knowledge of such a condition, defendant negligently failed and omitted to perform said duty, or otherwise to cause the dangerous nuisance to be abated. This is the substance of the complaint.

The charter of a municipal corporation is a public act, of which the courts take judicial notice, without any recital of its provisions in the pleadings.—*Smoot v. Wetumpka*, 24 Ala. 121; *Case v. Mayor of Mobile*, 30 Ala. 538; *Perryman v. Greenville*, 51 Ala. 510.

In March, 1870, a statute was passed, entitled "An act to establish a new charter for the city of Huntsville." The name given to the corporation is, "The Mayor and Aldermen



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of the City of Huntsville." According to section 2, "the corporate limits . . . embrace an area of land two miles square, whose centre shall be the centre of the public square in said city," &c. Section 4 provides, "that the government of said corporation shall consist of, and its corporate power shall be exercised by, a mayor and eight aldermen, who shall be elected," &c.; and section 17 enacts (among many other important provisions), that they "shall have power and authority to declare, prevent, and remove nuisances; . . . to erect and repair bridges; to construct drains and sewers, and keep them in repair; . . . to keep in repair the streets, avenues, and alleys of said city; to discontinue and close them, when expedient; to widen or change their direction, and open new ones; . . . to pave, grade, macadamize, or otherwise improve any street, or part thereof; to provide the means therefor, if deemed expedient and proper, by assessments on the owners of property to be benefitted thereby, or by assessment on the property to be benefitted, and to collect and enforce such assessments as other taxes; . . . to provide for the punishment, by fine, or fine and imprisonment, or by imprisonment, or by work on the streets, or other work of the city, of any breach of the laws, by-laws, ordinances of the corporation; . . . and to pass all such laws, by-laws, and ordinances, as may be necessary or proper to execute the powers in this charter granted, as may be expedient for good government of the city."—Acts 1869-70, 412.

These, and many other provisions in the charter, show that Huntsville was a city of consequence, and that it was endowed, as such, with ample powers and faculties, and an organization for the exercise of them, by which it was designed to make this city, in a very large degree, independent, in its internal administration, of State and county officials. Was it so charged by this legislation with the duty of keeping the streets in order, as to be liable to appellant for the consequences of the accident to him? The circuit judge was of the opinion, that it was not. He sustained the demurrer to the complaint—not on the ground that its averments were defective, but, as the judgment-entry recites, "because there is no duty imposed upon the defendant, to keep the streets of said city in repair, or to put up guards or barriers, in cases, and under circumstances, as alleged in the complaint." We shall not, therefore, scrutinize the counts in the complaint, to see whether or not they could be made better by amendment. The declaration in *Smoot v. Wetumpka*, 24 Ala. 116, might be advantageously consulted, in the preparation of such a complaint.

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Probably, it was under the influence of the case just referred to, that the circuit judge reached the conclusion, that the city was not liable in the present cause. The particular duty of keeping the streets in repair was enjoined on the municipal authorities of Wetumpka, in express terms; ample authority to raise the means of doing so was conferred upon them, while the inhabitants of the town were, at the same time, expressly exempted from working on the public roads of the county. Some stress was laid by the court on these facts; and the case did not require more to be said than the court did say, to-wit: "Where a particular duty is positively enjoined, and no discretion is vested in the corporation, as to whether it will or will not perform it, . . . and, having the means for performing this duty, the corporation willfully or negligently fails to perform it, in consequence of which failure an extraordinary injury happens to an individual, we see no reason why an action will not lie as well against it, as against an individual, for a similar omission of duty that works an injury to another."—24 Ala. 121.

But the court did not say that it was only in such a case that a municipal corporation would be liable to one so injured. The subject has been studied, and the judicial decisions in respect to it examined, and the results expressed in carefully considered language, by Judge DILLON, in his excellent work on Municipal Corporations. After showing that the same law is not applicable to counties and their subdivisions, called in New England "towns," and like *quasi*-corporations, he says (§ 789): "It may be fairly deduced from the many cases on this subject referred to in the notes, that, in the absence of an express statute, imposing the duty, and declaring the liability, *municipal corporations proper*, having the powers ordinarily conferred upon them, respecting bridges, streets, and side-walks, within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. Such a duty and liability are considered to exist, without a positive statute, when the following conditions concur: 1. The place in question, whether bridge, side-walk, or street, must be one *which it is the duty of the corporation to repair, or keep in a safe condition*; and this *duty* (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation. 2. This duty or burden must appear, upon a fair view of the charter, or statutes, to be imposed or rest upon the *municipal corporation as such*, and not upon it as an agency of the State, or upon its officers as independent pub-



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lie officers. (This, however, in general, appears sufficiently, when the municipality sought to be made liable exists under a special charter, or general act, which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the State at large under the general enactments concerning ways.) 3. The power to perform the duty of maintaining the streets in a safe condition, by authority to levy taxes, or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation. . . . Where the duty to repair is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and liability, if there be nothing in the charter or legislation to negative the inference, has often, and, in our judgment, properly, been deduced from special powers conferred upon the corporation, to open, grade, improve, and *exclusively control* public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal, to enable it to discharge this duty."

These long extracts are made because of the evident pains taken by the learned author, to state the doctrine, which is the result of the decisions on the subject, in its exact extent, and with its just qualifications, in words selected with a judicial care for accuracy.

In the case of *Robbins v. Chicago* (2 Black, 422), in the Supreme Court of the United States, it is said: "It is well settled, that a municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that may be dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer." This was a case, in which, also, a person was injured by a fall that might have been prevented, if railings had been put up by the property-holder who had caused the excavation to be made.

It is quite plain, upon examining the provisions of the charter of Huntsville, in the light of the law as above set forth, that the city is liable for all the damages sustained by appellant, if the precipice referred to had existed in its unguarded and dangerous condition, within observation by the people generally, for such length of time as must have enabled it to be known, and appellant did not bring the disaster



[Howe Machine Company v. Ashley.]

upon himself, by his own culpable negligence in not avoiding an obvious peril.

The circuit judge erred in his ruling sustaining the demurrer; and the judgment must be reversed, and the cause remanded.

## Howe Machine Company v. Ashley.

*Attachment against Foreign Corporation.*

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1. *Exception; sufficiency of.*—When the bill of exceptions, after setting out a charge given by the court, adds, “and the defendant objected,” this sufficiently shows an exception to the charge.

2. *Authority of agent.*—Authority to sell, and to canvass for the sale of sewing-machines, does not, *per se*, confer on the agent the power to bind his principal by buying or hiring a horse or mule to aid him in carrying on the business.

3. *Ratification of agent's unauthorized act.*—If the contract between the agent and his principal bound him to furnish a horse or mule for his own use, the acceptance of the profits of his services would not bind his principal, on the doctrine of ratification, to pay for a horse purchased or hired by the agent on credit; and if the rule did apply in such case, a ratification by the principal could not be presumed, unless he had knowledge of the source and circumstances under which the money was earned by the agent.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. WM. L. WHITLOCK.

This action was brought by B. F. Ashley, against the “Howe Machine Company,” a foreign corporation; and was commenced by attachment, sued out before a justice of the peace, on the 17th October, 1873. The case having been removed by appeal, on the part of the defendant, the plaintiff there filed a complaint, claiming \$22, “due by account, for the hire of a mule or horse, on the — day of —, 1873;” to which the defendant pleaded the general issue, and issue was joined on that plea. On the trial, the following bill of exceptions was reserved by the defendant:

“On the trial of this cause, the plaintiff testified that he hired a mule to one Thomas N. Beason, as the agent of said defendant, and that the use or hire of said mule was worth \$22. The defendant admitted that said Beason was its agent for the purpose of selling machines, but no further. The plaintiff then called one James L. Green as a witness, who testified that said Beason traded to him a sewing-machine wagon, for a horse, and that one Perry Ransom, district agent for said company, afterwards recognized such sale,

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stating that said company had furnished said wagon to said Beason to get him a horse with. The defendant then read in evidence the deposition of Charles N. Bull, who testified as follows: 'I am not a member of the Howe Machine Company, but am an employee. I commenced acting for the said company in April, 1873, and resigned my position on the 20th August, 1874, which was that of manager of the Alabama and Mississippi district; and since that date I have acted as special agent. The said company authorizes the sale of the Howe sewing-machines in Alabama. The company appoints and employs agents to sell machines for said company. Perry Ransom was appointed as a district agent, and he appointed Thomas A. Beason as canvasser, and had authority to do so. Beason was appointed to canvass St. Clair county, Alabama. The company did not authorize said Beason to hire a mule, or any other sort of team, at the expense of said company, in order to enable him to sell machines for said company; and Perry Ransom had no authority to authorize him, said Beason, to hire a horse, or any other team, at the expense of the company. The company did not, at any time, furnish a canvasser with a horse, mule, or other team; but furnishes them with a wagon, at a monthly rate of \$10.'

"The testimony on both sides being closed, the court charged the jury, that if Beason had authority from the company to sell sewing-machines, then he had also implied authority, at the company's expense, to employ any means that was necessary to carry out the object of his agency or authority; and the defendant objected. The court charged the jury, also, that if the company received any of the benefits by reason of the hire of said mule, then the company would be liable for the hire of said mule by Beason; and the defendant objected. The defendant then requested the court to charge the jury, that before the company would be liable for the hire of said mule by Beason, by receiving the benefits arising from the hire of said mule, the company must have had, at the time of receiving such benefits, a clear and distinct knowledge that it was the benefits arising from the hire of said mule. The court refused this charge, and the defendant excepted."

The charges given, and the refusal of the charge asked, are now assigned as error.

JAS. R. VANDERGRIFF, for appellant, cited *Fisher v. Campbell*, 9 Porter, 210; *Wood v. McCain*, 7 Ala. 800; *Poncell's Adm'r v. Henry*, 27 Ala. 612; *Whitney v. Merchants' Express Co.*, 6 Amer. 207; *Cox v. Robinson*, 2 Stew. & P. 91; *Chitty*

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on Contracts, 229; *Blevins v. Pope*, 7 Ala. 371; *Crawford v. Barkley*, 18 Ala. 270; *Whitesides v. Jennings*, 19 Ala. 784; 10 Amer. 145.

STONE, J.—The record shows that the two several charges, given by the court below, are sufficiently excepted to, to present each of them for our decision.—*Sackett v. McCord*, 23 Ala. 851.

2. One dealing with an agent is bound, at his peril, to inform himself of the extent of the agent's authority to bind his principal. Authority to sell, and to canvass for the sale of sewing-machines, does not, *per se*, confer the power to purchase or hire a horse or mule, to aid the agent's locomotion, and thus fasten a liability on the principal for the purchase price or hire. This depends on the terms of the contract, by which the agent was employed. The law does not presume the agent, in such service, is clothed with authority to bind his principal by such contract.—1 Brick. Dig. 55, §§ 35, 36; *McCreery v. Slaughter*, at the present term.

3. Nor does the doctrine of ratification, by receiving the products or profits of the agency, apply to such a case as this, if the agent was without authority to bind his principal in the matter of procuring the mule. If the contract was, that the agent should furnish his own horse or mule, then no implication arises against the company, from the act of receiving the profits or proceeds of the agent's services. Even if the rule did apply, then ratification by the principal could not be presumed, without knowledge of the source, and circumstances under which the money was earned and realized.—*McGowen v. Garrard*, 2 Stew. 479; *Alderson v. Harris*, 12 Ala. 580; 1 Brickell's Dig. 59, § 98; *Powell v. Henry*, 27 Ala. 612.

The Circuit Court erred in each of the charges given. The judgment is reversed, and the cause remanded.

## Hammett v. Brown.

### Action on Common Counts.

1. When principal may maintain action against agent, for money had and received.—As a general rule, the principal can not maintain an action against his agent, for money collected and not paid over, without a previous demand; but this rule does not apply, where the agent denies his liability, or otherwise shows that a demand would have been fruitless.

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2. *Charge to jury; rule of construction.*—Instructions to the jury must be construed in connection with the evidence; and if, when so construed, they are correct, their incorrectness, as applied to a different state of facts, is not a reversible error.

3. *Charge withdrawing evidence from jury.*—A charge requested, which withdraws from the consideration of the jury any evidence, however weak or inconclusive it may be, may properly be refused.

4. *Abstract charge.*—To authorize a reversal on account of an abstract charge, the record must show that it misled the jury, to the prejudice of the appellant.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LOUIS WYETH.

RICE, JONES & WILEY, for appellant, cited *Sally v. Capps*, 1 Ala. 122; *Farrow v. Riggs*, 30 Ala. 261; *Stewart & Pratt v. Frazier*, 5 Ala. 114; *Jarrell v. Lillie*, 40 Ala. 271; *Lehman, Durr & Co. v. Warren & Burch*, 53 Ala. 535; 1 Brickell's Digest, 872, § 965.

INZER, HAMILL & DICKINSON, *contra*.

BRICKELL, C. J.—The action was commenced by the appellee, and the complaint contains only the common counts in *assumpsit*. The pleas were the general issue, payment, and set-off. The bill of exceptions contains all the evidence; and it is apparent that the controversy, in the court below, was narrowed to the single inquiry, whether the defendant had, as the agent of the plaintiff, collected a claim of which the plaintiff was the beneficial owner, and which he had left with the defendant for collection, against the Louisville & Nashville Railroad Company. The Circuit Court charged, that if the defendant had collected the money on the claim, the plaintiff was entitled to recover it. The error of the charge, now asserted, is, that a principal cannot sue his agent, for money collected, without having first requested or demanded payment of it, and it entitled the plaintiff to a recovery without evidence of such demand. The principle is correct, and has its foundation in the corresponding duties of the relation of principal and agent. The principal cannot place the agent in default, subject him to an accusation of infidelity, and to the costs and vexation of suit, unless he first demands of the agent a performance of his duty. But, if the agent denies his liability to the principal, or otherwise shows a demand would have been fruitless, the law relieves the principal from the duty of making it.

Instructions to a jury, given on the trial of a cause, must be construed in connection with the evidence; and instructions may be correct, when read in the light of the particu-

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lar facts, which would be erroneous under a different state of facts. In the present case, if there had been no other evidence, than that tending to show the defendant had collected the money of the plaintiff, the charge given would be erroneous; for, without some evidence of a demand, the defendant would not have been in default. But, the defendant denying the fact of the collection of the money, and limiting his defense to the fact of collection, no evidence of a demand was necessary.—*Stewart v. Frazier*, 5 Ala. 114.

The charge requested by the defendant excluded from the consideration of the jury all the circumstantial evidence, which tended to show that he had collected the money. A court does not err, in refusing an instruction which withdraws legal evidence, however inconclusive or weak it may be, from the consideration of the jury.

If, as is now insisted, the charge given on the request of the plaintiff was abstract—unsupported by evidence, and directing the attention of the jury to an immaterial inquiry; to authorize a reversal, it must appear the jury were thereby misled, to the prejudice of the appellant.—1 Brick, Dig. 336, § 11. It seems to us, that directing the attention of the jury to the inquiry, whether the plaintiff had or not collected the money of the railroad company, could not possibly have worked any injury to the defendant.

Let the judgment be affirmed.

## Wood v. Montgomery.

### *Action for Use and Occupation of Land.*

1. *Real estate belonging to partnership.*—When the title to real estate is conveyed to a partnership, although a court of equity will sometimes treat it as partnership assets, yet, at law, the several partners hold it as tenants in common.

2. *When tenant in common may maintain action for use and occupation.*—Where there has not been a joint letting of lands held by tenants in common, each tenant may maintain a separate action for his proportionate part of the amount due for the use and occupation.

3. *Sale of decedent's lands, under probate decree; conveyance to purchaser, without report of payment of purchase-money.*—When lands are sold by an executor, under a decree of the Probate Court, and the sale is reported and confirmed, and a conveyance is executed by the executor to the purchaser, reciting therein the payment of the purchase-money; the conveyance will not be held void, in an action brought by the purchaser against a stranger, because the payment of the purchase-money was not reported to the court, and an order obtained for the execution of the deed.

4. *Error without injury in charge to jury.*—When the bill of exceptions shows

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that the plaintiff, on the trial below, proved a clear legal title in himself, entitling him to recovery, the judgment in his favor will not be reversed, because the court instructed the jury that an equitable title would support his action.

## APPEAL from the Circuit Court of Blount.

Tried before the Hon. LOUIS WYETH.

This action was brought by George W. Montgomery, against Edmund N. Wood, to recover for the use and occupation of a town lot in Blountsville, in which the plaintiff claimed an undivided half interest; and was commenced on the 28th June, 1875. The defendant pleaded, "in short by consent," 1st, the general issue; and, 2d, payment to Robert B. Montgomery, with an averment that he used and occupied the premises under a contract with said R. B. Montgomery, and that plaintiff and said R. B. Montgomery held them as partners; and issue was joined on both of these pleas. On the trial it appears, as the bill of exceptions shows, that the lot had belonged to one Locke Beeson, since deceased, and was sold by his executor, but at what time is not stated, under an order of the Probate Court; at which sale, the plaintiff became the purchaser; and the sale having been reported to the court, and confirmed by it, some time during the year 1859, the executor executed a conveyance of the land to G. W. & R. B. Montgomery as partners, reciting therein the payment of the purchase-money. In reference to this purchase and deed, the plaintiff testified, that he made the purchase in his own name, and afterwards agreed to let said R. B. Montgomery, who was his brother and partner, have a half interest in it; that he paid the purchase-money with funds belonging to the partnership, and took the conveyance in the name of G. W. & R. B. Montgomery after the dissolution of the partnership, but before the partnership accounts had been adjusted. The defendant objected to this evidence, "on the ground that it was illegal and irrelevant," and reserved an exception to the overruling of his objection.

The plaintiff offered in evidence the last will and testament of said Locke Beeson, and its probate; the executor's application for the sale of the lands; the order of sale; the executor's report of the sale, in which it appeared that the plaintiff was the purchaser; the order of the court confirming the sale, and the executor's deed to G. W. & R. B. Montgomery. None of these papers are set out in the record; but the bill of exceptions recites, that the will conferred no power of sale on the executor, and that the executor had never reported the payment of the purchase-money to the court, nor had the court ordered him to make a conveyance to the purchaser. "After this evidence had all gone to the



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jury, the defendant moved the court to exclude it, because the purchase-money had never been reported paid, and the said Probate Court had never ordered the executor to make a conveyance of said land, and the legal title to said lot was still outstanding in the heirs or devisees of said Locke Beeson, deceased." The court overruled the objection, and the defendant excepted.

"The plaintiff testified, also, that said firm went into the possession of said lot under said purchase, and remained in possession thereof until the dissolution of said firm, which took place some time during the year 1862; that he then went out of possession, and said R. B. Montgomery remained in the possession, under a verbal agreement to pay him \$75 *per annum* for one-half of the rent; that said R. B. Montgomery remained in possession of the same, or a portion of said lot, until his death in March, 1874; that the defendant went into the possession of the store-house on the lot about the 10th August, 1872, and remained in possession until May, 1874; that he notified the defendant, before he entered on the premises, that he owned one-half the lot, and that his half of the rent must be paid to him, and to no other person; and that one-half the rent was worth \$75 *per annum*." The defendant testified, as a witness for himself, "that said notice was given him by plaintiff in January, 1872; that he afterwards rented and occupied another house for several months, during which time the store-house on said lot was occupied by said R. B. Montgomery and one Gilmer, as mercantile partners; that on the 10th October, 1872, he bought out their stock of goods, and rented the store-room and counting-room from said R. B. Montgomery, for \$75 *per annum*, and went into possession under said contract, and not otherwise; that said R. B. Montgomery, after the expiration of one year, retained the use of the counting room, and defendant was to pay \$60 *per annum* for the store-room alone; and that he paid the agreed rent of said premises, as stipulated, to said R. B. Montgomery before the commencement of this suit."

"The foregoing being the substance of all the evidence adduced, the court charged the jury, of its own motion, as follows: 'If the jury believe, from the evidence, that the plaintiff, before and during the period described in the complaint, had a half interest in the lot therein described, with R. B. Montgomery, it does not matter whether he was joint tenant, tenant in common, or part owner thereof, nor whether he held such interest by a legal or an equitable title; and if plaintiff gave the defendant notice, prior to August, or October 1872, to pay his part of the rent of the store-room on

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the lot to him, and not to pay the same to any one else, if he occupied said store-room; and that defendant, after receiving this notice, did occupy the said store-room,—then the plaintiff was entitled to recover one-half of the reasonable value of the use and occupation of said store-room, during the time defendant occupied the same, with interest from the time the same became due. That, if the jury believed, from the evidence, that the lot was bid off by the plaintiff alone, at the sale of the lands of Locke Beeson, deceased, and was afterwards paid for by said late firm of G. W. & R. B. Montgomery; then the plaintiff had an equitable title to a one-half interest in said lot, and could recover in this action on that equitable title." These charges, to which the defendant excepted, are now assigned as error, with the rulings of the court on the evidence, as above stated.

C. F. HAMILL, for appellant, cited *Bonner v. Greenlee's Heirs*, 6 Ala. 411; *Lightfoot v. Lewis*, 1 Ala. 475; 1 Brickell's Digest, 335, § 3; *Gunder v. Leckey*, 30 Ala. 591.

JOHN W. INZER, *contra*.

STONE, J.—While a title to real estate, made to a partnership, will, in some circumstances, be treated as partnership assets in a court of equity, in a court of law the members of the partnership hold such real estate only as tenants in common.—*Henry v. Parmer*, at last term; 2 Brick. Dig. 303, § 55; *Lang v. Waring*, 25 Ala. 625.

2. In cases where there has not been a joint letting of lands held by tenants in common, either tenant may maintain a separate action for his proportion of the sum due for use and occupation, or for a trespass or wrong done to the freehold or possession.—2 Brick. Dig. 340, §§ 165, 168, 169; 1 Chitty's Pl. 65, 191.

3. The land, or lot, for the occupation of which the present action was brought, was purchased at executor's sale, made under an order of the Probate Court. The sale was reported by the executor to the Probate Court, and the sale confirmed. The sale was on credit. Subsequently the executor made conveyance of title to G. W. & R. B. Montgomery, reciting in the deed that the purchase-money had been paid. It is contended for appellant, that, inasmuch as there was no report made that the purchase-money had been paid, and no order of the Probate Court, directing title to be made, the executor's deed did not vest title in the purchasers, but left it in the heirs. We think this argument unsound. Should a conveyance be made when the purchase-

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money has not been paid, we will not say those interested in the estate, as distributees or creditors, could not, if need be, have redress. That is not this case. Here, a stranger, having no visible interest in the estate, seeks, in a collateral proceeding, to defeat the operation of the deed. Not because the purchase-money had not been paid. That is neither proved nor averred. The recital in the deed admits payment, and thus estops the executor to deny it. The sole ground is, that the executor had not reported that fact to the court, and obtained an order to make title, before he executed the deed. While we admit this was an irregularity, it does not avoid the conveyance.

4. Under these views, it was the duty of the Circuit Court to instruct the jury, that plaintiff had shown a legal title to the lot in himself, as tenant in common with the heirs of R. B. Montgomery. The charge of the court, that an equitable title in plaintiff would support his action, whether right or wrong, could not possibly have injured the defendant.

The judgment of the Circuit Court is affirmed.

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*Bill in Equity by Infant Heirs at Law, to enforce Vendor's Lien on Lands sold by Administrator under Probate Decree, and set aside Decree for Conveyance to Purchaser.*

1. *When heirs or distributees may maintain bill in equity, against debtors of estate.*—The general rule is, that neither creditors, distributees, nor legatees can maintain a bill in equity against debtors of the estate, to subject the debts to the satisfaction of their demands; and if there is an exception to this general rule, where a debtor has, by fraud and misrepresentation, induced the administrator to accept worthless notes and bonds in payment of a debt, and the administrator is insolvent, the complainants must show the existence of a debt which the administrator himself could recover.

2. *Sale of land by administrator, under probate decree; vendor's lien, as against sub-purchaser.*—A sub-purchaser of lands sold by an administrator under a probate decree, who contracts with the original purchaser for a portion of the lands, is not a debtor of the administrator, nor of the estate: if the administrator or heirs attempt to subject the lands so bought by him to the payment of the original purchase-money, an equity at once arises in his favor to have the other lands first subjected; and if the heirs have released the original purchaser from all liability on account of his purchase, with a reservation of the right to assert against the sub-purchaser their title to the lands bought by him, they can not assert against him a vendor's lien for any portion of the original purchase-money.

3. *Same; decree ordering conveyance to purchaser.*—When lands are sold by an administrator, under a probate decree, for equitable division, the title of

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the heirs or devisees is not divested, until the purchase-money has been paid, and a conveyance has been executed to the purchaser under the decree of the court, which decree may be rendered on the application either of the administrator or of the purchaser (Code of 1876, § 2468); and when the application is made by the purchaser, although notice to the heirs is not necessary, notice to the administrator is indispensable: and a decree rendered without notice to him is absolutely void, at law as well as in equity. (Overruling *Dugger v. Tayloe*, 46 Ala. 320.)

APPEAL from the Chancery Court of Hale.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 31st October, 1873, by Hobart C. Dugger and Mrs. Alice V. Sprague, who sued by her husband as her next friend, two of the children and heirs-at-law of Henry Dugger, deceased; against Henry A. Tayloe, Willis P. Bocock, and Robert L. Maupin; and against Mrs. Alice G. Dugger, the widow of said decedent, who was sued individually, and as administratrix of the estate of John W. Dugger, one of their children, and as guardian of the complainants; and against the other surviving children of said Henry Dugger. It sought to vacate and set aside a decree, rendered by the Probate Court of Marengo county, on the 21st March, 1868, by which a conveyance of certain lands, which had been sold by said administratrix of Henry Dugger's estate, under a former order or decree of said court, was ordered to be made to said Willis P. Bocock, as the purchaser at that sale; and to enforce a vendor's lien on a portion of the lands, containing one hundred and ninety-six acres, which was in the possession of said Tayloe and Maupin.

Henry Dugger died, intestate, in 1852, at his residence in said county of Marengo, in that portion of the county which now forms a part of Hale county; and left him surviving, as his heirs-at-law and the distributees of his estate, his widow and eight children, whose names, ages, residences, deaths, &c., were stated in the first paragraph of the bill, showing that all parties interested in his estate were brought before the court. The said decedent died seized and possessed of a certain tract of land in said county, embracing the lands involved in this suit, which were described in the bill as "the south-east quarter of section thirty (30) and all of section thirty-one (31) lying north of the Selma and Meridian railroad, all in township eighteen (18), range four (4), east, containing one hundred and ninety-six acres, more or less;" which lands descended to his children as heirs-at-law, free from any claim of dower on the part of the widow, who had by contract released her right of dower. Letters of administration on his estate having been granted to the widow, but at what time does not appear by the record, she filed

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her petition in the Probate Court of said county of Marengo, on the 3d September, 1860, asking an order to sell all the lands, for the purpose of making an equitable division, or distribution, among the heirs. The order of sale was granted on the 22d October, 1860, and the lands were sold under the order on the 19th November following. The sale was reported to the court by the administratrix on the 12th January, 1861, stating in her report that said Willis P. Bocock was the purchaser, and had given his notes for the purchase-money according to the terms of the sale; and the sale was confirmed by the court, at its April term, 1861. These facts were stated in the bill, but the petition, order of sale, report, &c., are no where set out in the bill or exhibits. After the close of the war, the heirs having brought an action at law to recover the lands, Bocock filed his petition in said Probate Court, on the 21st March, 1868, alleging that he had paid the whole of the purchase-money according to the terms of the sale, and had never received a conveyance of the lands, and asking that a deed might be executed to him under the order of the court. The court granted the order, on the same day the petition was filed, and appointed a commissioner to execute a deed to said Bocock; and a deed was executed to him accordingly. The heirs having failed in the action at law, they brought the case to this court by appeal; and the judgment of the court below was affirmed by this court, at its June term, 1871, as shown by the report of the case.—*Dugger v. Tayloe*, 46 Ala. 320. The bill in this case was afterwards filed. Its material allegations, on which equitable relief as to these matters is sought, are contained in the following paragraphs:

4. "Said Alice G. Dugger was the administratrix of said Henry Dugger's estate; and as such, on the 3d September, 1860, filed her petition in the Probate Court of Marengo, from which her said letters of administration were derived, praying the order of said court to sell said lands, together with all other lands of said decedent, for distribution, the said estate being then free from debt; and on the 22d October, 1860, said court ordered said lands to be sold; and on the 19th November, 1860, she so sold the same, and Willis P. Bocock became the purchaser of the whole of the lands belonging to said estate, including the land hereinbefore specifically named, at the price of \$45.01 per acre, on a credit of one, two, and three years, with interest from date of sale. The said lands so sold and purchased by said Bocock amounted altogether to six hundred and forty acres, his bid amounting in the aggregate to the sum of \$28,806.40; for which he executed his three notes, with F. S. Lyon and

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H. W. Reese as sureties, payable to Alice G. Dugger as administratrix of said Henry Dugger, deceased, dated the 19th November, 1860," and payable on the 19th November, 1861, 1862, and 1863, respectively; "and said sale was reported by said Alice G. Dugger to said Probate Court on the 12th January, 1861, and was confirmed at the April term of said court, 1861; but no deed was made to the purchaser until some time thereafter, as hereinafter stated."

5. "Although said Willis P. Bocock was the ostensible purchaser of the whole of said lands, yet, by some arrangement between him and said Henry A. Tayloe, made before or at the time of said purchase, said Tayloe obtained by the understanding with Bocock, the one hundred and ninety-six acres before mentioned, and undertook with said Bocock to pay the purchase-money for the same at the rate aforesaid, and said Tayloe went into, and has since had the possession thereof." "Said Maupin having, for some years past, resided on the land with said Tayloe, as part of his family, has participated with said Tayloe in the occupation of, and planting on the same; but your orator and oratrix do not know upon what terms said Maupin participated with said Tayloe in the possession of said lands."

6. "Neither said Bocock, nor any one else, has ever paid the purchase-money evidenced by said notes, or any part thereof, according to the terms of his purchase, or in any manner, except as hereinafter stated; and the purchase-money for said one hundred and ninety-six acres, with interest thereon, remains unpaid."

7. "Said Bocock took up the said two notes first falling due, with Confederate States treasury-notes; and the said note last falling due he took up, by handing over to Mrs. Alice J. Dugger bonds of the Confederate States. Your orator and oratrix, who were then infants, state, upon information and belief, that Bocock and the defendant Henry A. Tayloe together urged the said Alice G. Dugger to accept said Confederate notes and bonds in payment of said Bocock's notes, at a time when all her children who were of age were absent from home; and the said Alice G. received such Confederate notes for the note first falling due, without remonstrance; she reluctantly yielded, and received the Confederate notes for the note secondly falling due; but, when they urged her to accept the said treasury-notes, or Confederate bonds, for the last note, she peremptorily refused to accept said Confederate notes and bonds, which were then really almost worthless, in payment of said note, and for a long time continued to refuse, and sent the said Bocock and Tayloe away without taking the offer. But she had great



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confidence in and esteem for said Bocock and Tayloe, who were her neighbors, and were men of high character; and they brought great pressure to bear on her, to induce her to take Confederate notes and bonds. They represented to her that, if she refused to take Confederate money in payment of said note, she would be ruinously taxed by the Confederate government, and would be made to pay the tax in gold; and they, or one of them, reported her refusal to the Confederate tax-collector, who called on her, and told her he was informed of her refusal; and finally, under great pressure, under protest, and unwillingly, said Alice G. Dugger very reluctantly yielded, and took said Confederate bonds, and gave up to said Bocock said last note. The sons of said Alice G. Dugger, then of age, were absent in the army."

8. "Said Alice G. Dugger never would, and never did, report to said Probate Court of Marengo that the purchase-money for said lands, so sold by her as administratrix, had been paid, but purposely abstained from so doing; and shortly after the war ended, your orator and oratrix, then infants, with the other heirs-at-law of said Henry Dugger, deceased, and said Alice G. Dugger, brought their action at law, in the nature of an action of ejectment, to recover said six hundred and forty acres of land; and anticipating that said Bocock would make some effort to obtain a conveyance of said lands from said Probate Court, your orator and oratrix, with said W. W. Dugger and L. W. Dugger, filed their protest, or *caveat*, in said court, on the 12th May, 1866, protesting against and objecting to any confirmation of the sale, or order to make titles, on the ground that the sale was without any valid or lawful order of said court, and that said sale was unauthorized and void, and that the entire purchase-money had never been lawfully paid."

9. "After the filing of said protest, or *caveat*, and while said action was pending in the Circuit Court of Marengo by the heirs-at-law of said Henry Dugger, deceased, and Alice G. Dugger as a purchaser of the interest of one of said heirs, against said Bocock and Tayloe, said Bocock did, for the express purpose of defeating said action at law, on the 21st March, 1868, file his petition in the Probate Court of Marengo, a copy of which is hereunto attached, as a part of this bill, marked 'Exhibit B;' wherein he represented and stated, that he had paid the whole purchase-money for said lands, when in fact he had never paid it, nor any part thereof, otherwise than in Confederate States treasury-notes and bonds, as already herein set forth in detail; and further setting forth in his petition, that said Alice G. Dugger had not reported such payment, though more than a reasonable time

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had elapsed for her to have done so; and praying that an order for a conveyance of said lands to him might be made. And said Probate Court, notwithstanding said protest and *caveat* filed by said heirs long before that time, and which was then on file, and without notice to the administratrix, or to any of said heirs, and without the knowledge by them of said application, and upon *ex-parte* proof made by said Bocock, did appoint H. A. Woolf, a brother of the judge of said court, and an entire stranger to the estate, having no interest therein, or knowledge of the affairs thereof, to execute titles to said Bocock; and said Woolf, in compliance with said order and decree of said court, made conveyances of said lands to said Bocock, without notice to, or knowledge by the administratrix. Said petition was filed by Bocock, and said decree for titles to him was rendered, in vacation, and on Friday, when there was no regular or adjourned term of said court. The decree was rendered on the same day the petition for titles was filed, and your orator and oratrix insist that said decree for titles is void; and said proceedings were had without notice to, or knowledge by the said heirs, or to their counsel, whose name was indorsed on the *caveat* filed by him as their attorney of record, of any of the proceedings; and the said action at law by the heirs was defeated by the production of said conveyance, on the ground that the remedy was by direct proceedings in chancery to impeach said order or decree."

10. "After said Bocock had obtained said conveyance, to-wit, on the 11th June, 1868, he and the said Alice G. Dugger, W. W. Dugger, R. W. Dugger, L. W. Dugger, and your orator and oratrix, who were then infants, entered into a compromise respecting so much of said land as was embraced by said sale, except the one hundred and ninety-six acres sought to be subjected by this bill, and of the money due therefor; a copy of which contract is hereunto appended as a part of this bill, marked 'Exhibit C;' and your orator and oratrix, since they have become of age, have ratified, and do ratify said compromise; but the rights of your orator and oratrix, respecting said one hundred ninety-six acres of land, are not touched by said agreement, but are expressly excepted therefrom; and upon effecting said compromise, said action was restricted to said one hundred and ninety-six acres."

11. At the April term, 1864, of said Probate Court of Marengo, Mrs. Dugger "made what purports to be a final settlement of her administration of said estate, and charged herself, or was charged, with the whole of the purchase-money of said six hundred and forty acres of land, as so

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much lawful money; and it nowhere appeared in the record of said settlement that she had only taken Confederate notes and bonds. On said pretended final settlement, she was charged with a balance of \$40,170.40, after due credit for all debts of the estate, which she had in fact paid before said sale, and for all costs, charges, and expenses of administration, leaving that sum for distribution among the heirs; and the decree of said court," a copy of which is appended as an exhibit, "recites that the distributive share of each of said heirs and distributees is one-eighth of said sum; which said sum of \$40,170.40 is, to the extent of \$37,220.14, composed of said land-money, and the sum of \$3,804.72, interest thereon to the time of said pretended settlement, charged against said administratrix."

12. L. W. Dugger, R. H. Dugger, F. E. Dugger, and W. W. Dugger were of lawful age when said decree was rendered; and the bill charges, on information and belief, that they "did not question, but abided by said decree, nor have they claimed or received anything thereunder; but your orator and oratrix were then infants, and do not consent to the abandonment of their rights to the purchase-money of said one hundred ninety-six acres of said land, or to look to their mother therefor, to the exoneration of said land. Said decree further recites, that said Alice G. Dugger was then guardian of your orator and oratrix, who were then minors, and had charged herself with their respective shares; but she never in fact received said sums, and no final decree is rendered in her favor as their guardian, against her as administratrix, for said sums; and your orator and oratrix insist that said decree was not final as to their rights,—merely reciting that it appears, by reference to her accounts as guardian, that she had charged herself as guardian with said sums."

13-14. Complainants "have never sought to enforce said decree against said Alice G. Dugger, and have never assented to the receipt of said Confederate notes and bonds, and have never received any part of them, nor derived any benefit from them." They were minors when said decree was rendered. Mrs. Dugger, and the sureties on her bond as guardian, "are unable to respond to said decree."

15. On the sale of said lands by the administratrix, "said Bocock and Tayloe each went into possession of his portion of the same,—said Tayloe going into possession of said one hundred and ninety-six acres, and said Bocock of the remainder of said lands; and said Tayloe's possession has since been retained by him alone, or in conjunction with said Maupin. Your orator and oratrix have but imperfect knowl-



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edge or information of the exact arrangement by which said Tayloe obtained the same, or whether he has the same in his own name, or in the name of some other person; and they pray that said Bocock, Tayloe and Maupin may answer, and set forth how and in what manner the same was acquired, and is held by them, or either of them; and what said Tayloe and Maupin, and each of them, paid for it, and in what sort of money or currency; and your orator and oratrix state, upon information and belief, that the Confederate currency and bonds, with which said Bocock took up his notes, was furnished by said Tayloe, to the amount of the purchase-money of said one hundred and ninety-six acres; and that said payment, though made in Bocock's name, was in fact, to the extent of the amount due for said one hundred and ninety-six acres, made by said Tayloe."

16. "Said Tayloe paid nothing for said lands, except Confederate money and bonds, which were not a valuable consideration as against your orator and oratrix, who were then minors; and they further say, that said Tayloe well knew that said Bocock had paid only Confederate notes and bonds for said lands; and they charge, on information and belief, that he participated with said Bocock in said wrong and injury to your orator and oratrix; and they show that said Maupin is the son-in-law of said Tayloe, and lives with him—that he married the daughter of said Tayloe in 1864, or 1865, and that he has no title to said lands, and is not a purchaser for value, and acquired whatsoever rights he may have with full knowledge or notice that nothing but Confederate notes and bonds had been paid for said lands."

The 17th (and last) paragraph of the bill alleged that Tayloe was insolvent, that the lands were wholly insufficient to pay the amount due to the complainants, and that an application of the rents and profits to their demand was necessary for their security; and the prayer for relief was added, as follows: "To the end therefore that an account may be taken of the amount due to your orator and oratrix respectively, as their several portions of the money arising from the sale of said one hundred and ninety-six acres of land, as heirs-at-law of said Henry Dugger, deceased, and as heirs-at-law of said John W. Dugger, deceased; and that the payment of the same may be enforced against said one hundred and ninety-six acres of land, and against the rents thereof, to accrue from the filing of this bill; and that said lands may be sold therefor, and that the decree for titles to said Bocock, and the deed made thereto, may be held void, or, if not, that it may be set aside, or held to be subordinate to the lien of your orator and oratrix; and that your orator

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and oratrix may have such other and further relief, as may seem proper, and as justice may require," &c.

The compromise, or release, mentioned in the 10th paragraph of the bill, is in these words: "This agreement, made and entered into this 11th day of June, 1868, by and between Willis P. Bocock of the first part, and Alice G. Dugger, W. Waverly Dugger, Reuben H. Dugger, L. White Dugger, Alice V. Dugger, and Hobart C. Dugger, parties of the second part, witnesseth: That in full and final compromise and settlement of the claims between the parties aforesaid, touching and concerning their claims and rights in and to the lands hereinafter mentioned, and of the suits between them in respect thereto, and of the damages, rents, and mesne profits, the said parties of the second part hereby agree to execute a deed, and thereby grant and convey unto the said party of the first part a good title in fee simple to a certain parcel of land described as the south-west quarter of section thirty-one (31), in township eighteen (18), range four (4), and three-eighths of the north half of the same section, to be taken off the southern part of said half section, by a line running east and west across the entire section; all situate and being in the county of Hale, State of Alabama. And the said Willis P. Bocock agrees to execute, together with his wife, a deed of conveyance, and thereby release and forever relinquish to the parties of the second part all right, title, and claim of himself and wife, in and to the residue of the said north half of section thirty-one (31), saving and excepting so much thereof as lies north of the Selma and Meridian railroad, which is claimed by one Henry A. Tayloe, and amounts to thirty-six and 43-100 acres, or thereabouts; but the said party of the first part is to retain possession of the said land, free of rent, until the first day of January next, or until the crop growing thereon shall be gathered; and the said party of the first part further agrees to pay to the said Alice G. Dugger the sum of two thousand dollars, for the benefit of the parties of the second part. And the party of the first part is hereby discharged from any and all claims which the parties of the second part, or any or either of them, may have against him, for any use and occupation of, or trespass to any lands ever owned by the parties of the second part, or either of them, whether the same were used and occupied by him or by any other person. But nothing herein contained shall in any manner impair or affect any right, title, or claim, of any or either of the parties of the second part, to any lands in the possession of said Henry A. Tayloe, or to rents and damages for the use thereof by said Tayloe, or to any action pending against said Tayloe. And



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Alice V. Dugger and Hobart C. Dugger being minors under the age of twenty-one years, the parties of the second part further covenant and agree that the said infants shall, as they respectively become of age, or within a reasonable time thereafter, fully ratify and confirm any deed executed by them, or either of them, under this agreement. And it is hereby further stipulated and agreed, by and between all the parties aforesaid, that the lands which are to be conveyed as aforesaid, by the party of the first part and his wife, shall remain bound for the fulfillment of the several matters and things to be done and performed by the parties of the second part, or any or either of them; and the party of the first part shall, and he hereby retains a lien thereon, for his indemnity, notwithstanding any deed he may execute in relation thereto. In testimony whereof," &c.

The defendants demurred to the bill, for want of equity, on the following grounds: 1. "That it is an attempt, in a collateral proceeding, to impeach a final decree of the Probate Court of Marengo county,—a court having jurisdiction in the matter of the sale of the lands in said bill described." 2. "That it shows that the lands in said bill mentioned were sold under a decree of the Probate Court of Marengo county,—a court having jurisdiction in the premises; that a petition for said sale was duly presented and filed in said court, setting forth the grounds of said sale, as required by law; and the jurisdiction of said court for said purpose thereby attached, and said decree was conclusive, and can not be collaterally impeached." 3. "That it shows that the purchase-money for said land was paid by the purchaser, and received and accepted by the administratrix in said bill mentioned; and that said purchase-money was, on the final settlement of said administratrix, under a decree of the said Probate Court of Marengo, distributed among the several distributees of said estate of Henry Dugger, deceased; and that the guardian of complainants received and charged herself, as such guardian, with the amounts of the shares of the complainants respectively; and complainants fail, in said bill, to offer to refund the same, or the value thereof." 4. "That it shows on its face, and in 'Exhibit D' thereto attached, that Alice G. Dugger, the administratrix therein mentioned, made a final settlement of the estate of her intestate in 1864, and was discharged in the Probate Court of Marengo county; at which settlement, complainants were represented by guardians *ad litem*: and said bill fails to make any allegation of fraud, or to show any excuse why said final settlement was not appealed from." 5. "Said bill shows on its face that complainants had a full, adequate, and complete remedy at law."



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The chancellor sustained the demurrer, on the fourth ground specially assigned, and dismissed the bill; and his decree is now assigned as error.

SMITH & ROULHAC, for appellants.—1. The bill does not seek to set aside the decree for the sale of the lands, but, admitting its validity, seeks to enforce a vendor's lien on the land for the unpaid purchase-money. Until the purchase-money is paid, there remains in the vendor a lien on the land for its security; and a court of equity enforces it on the principles which apply to trusts.—2 Story's Equity, § 1217, note 4; *Foster v. Trustees of Atheneum*, 3 Ala. 302; 5 Porter, 452; 50 Ala. 379; *Hutton v. Williams*, 35 Ala. 503; *McIntosh v. Reid*, 45 Ala. 460. The law enforces the lien in favor of an adult vendor, who, in the exercise of his free will, with the capacity to make his own contracts, has sold and conveyed by absolute deed, retaining no security for the purchase-money; *a fortiori*, it would seem, the court ought to interfere to protect the rights of helpless infants. The title to the lands vested in the complainants, instantly and absolutely, on the death of their ancestor; and it could only be divested, during their infancy and incapacity, by the action of some judicial tribunal, clothed with the power to do so in certain cases, and for certain specified purposes; and when that power is exercised by the court in any given case, an equitable lien for the purchase-money exists in their favor, until full payment is made.

2. Under the allegations of the bill, the purchase-money has not been paid. The land was sold in 1860, before Confederate currency had any existence, and hence it could not have been in the contemplation of the parties to the sale.—*Cameron's Adm'r v. Hudgens*, 50 Ala. 379; *Horn v. Lockhart*, 17 Wallace, 570. Nor are there any "special circumstances" in this case, as in 50 Ala. 379, *supra*. The sale was not made for the payment of debts; in which case, the debts being paid, the distributees of the estate would have received an equivalent for their lands, and would have suffered no injury. It was made for distribution among the heirs; the administratrix was the mere agent to conduct the sale; and she had no more right to receive Confederate money, than she would have had to receive \$20 per acre, from a purchaser who had bid \$50.

3. But the bill shows that the administratrix did not voluntarily accept the Confederate money and bonds—that, in fact, she accepted it under coercion and undue influence; under such circumstances that a court will relieve her from the consequences of the act. The ancient doctrine of the

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common law, in regard to threats and duress, was adapted to a semi-barbarous state of society, and required proof of actual force, or a reasonable fear of death, mayhem, or loss of limb.—Co. Inst. vol. 1, 482. But, in more modern times, adopting the ameliorations of the Roman Code, regard is had to the sex and age of the person, the relations existing between the parties, and all the circumstances by which they are surrounded; and relief is granted in all cases, where moral coercion, undue influence, abuse of confidence, fraud, or misrepresentation is shown.—Domat, pt. 1, book 1, tit. 18, §§ 2, 1245; Merlin, Ques. de Droit, tom. 4, 409; 2 Atk. 190; 14 Vesey, 215; Adams' Equity, 182-3; *Boyd v. Hawkins*, 2 Ired. Eq. 304; *Hatch v. Hatch*, 9 Vesey, 296; *Blackford v. Christian*, 1 Knapp, 77; 4 Watts & Ser. 323; *Chapman v. Hamilton*, 19 Ala. 121; 26 N. Y. 9; 5 Hill, 158; 2 Bay, 211; 1 Story's Equity, § 239. These authorities show, that the payment relied on would be set aside in equity, at the instance of the administratrix herself.—*Kennedy v. Kennedy*, 2 Ala. 571.

4. The pretended payment was a *devastavit*, in which the purchasers actively and knowingly participated; and the administratrix being unable to respond, as the bill alleges, they are liable for the debt, and it may be enforced against the lands.—*Harris v. Parker*, 41 Ala. 624; *Bondurant v. Thompson*, 15 Ala. 202; *Dean v. Rathbone*, 15 Ala. 328; Williams on Executors, 1105; 1 Beavan, 126; 2 Ired. Eq. 594; 8 Wheaton, 421; Tiffany & B. on Trusts, 198.

5. Even if Tayloe acquired title from Bocoek, and is to be regarded as a sub-purchaser from Bocoek; yet, having notice of the facts on which the complainants' rights are founded—not being entitled to protection as a purchaser for valuable consideration without notice—the lands held and claimed by him may be subjected to the vendor's lien.—*Morton's Adm'r v. Underwood*, 49 Ala. 419; *S. C.*, 44 Ala. 686. But, under the allegations of the bill, he is not to be regarded as a sub-purchaser from Bocoek: on the contrary, the bill shows that Bocoek "was only the ostensible purchaser"—that the purchase was made for the joint benefit of himself and Tayloe, under some private agreement between them; that each furnished his proportion of the Confederate notes and bonds received by the administratrix, and each was an active participant in forcing them on her acceptance, under the circumstances detailed in the bill.

6. Tayloe can claim no benefit from the compromise between Bocoek and the heirs, by which, for valuable consideration paid by Bocoek, in partial reparation of the wrong done, he was released by the heirs from all further liability,

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and the matters in controversy between them were equitably adjusted. But Tayloe was no party to that compromise and settlement, and the heirs expressly reserved the right to proceed against him and the lands which he had bought.

7. The probate order, or decree, under which a conveyance was executed to Bocock, does not conclude these complainants. Such an order is not grantable as "of course." It could only be properly granted in term time, on proof of the fact of payment, and after due notice to the parties interested in contesting the payment. Not having been so granted, it is void, and the complainants are not concluded by it.—Rev. Code, §§ 795, 1618; 3 Phil. Ev. (C. & H. Notes), pp. 922, 1289, note 639, and cases cited.

J. T. JONES, *contra*.—1. The bill is filed, really and substantially, for equitable relief against a settlement and decree of the Probate Court; and, since it fails to comply with the requirements of the statute (Rev. Code, § 2274), it was properly dismissed.—*Patterson v. Harris*, 48 Ala. —; *Otis v. Dargan*, 53 Ala. 178.

2. Independent of the statute, the bill is wanting in equity. Equity will not grant relief against a judgment at law, unless the party complaining can impeach it on grounds of which he could not have availed himself at law, or was prevented from doing so by fraud, accident, or the act of the opposite party, without any fault or negligence on his own part.—*Cul-lum v. Casey*, 1 Ala. 356; *French v. Garner*, 7 Porter, 552; *Wilson v. Randall*, 37 Ala. 76; *Lee & Norton v. Ins. Bank*, 2 Ala. 21; *Drew v. Hayne*, 8 Ala. 438; 9 Ala. 120; 8 Porter, 432; 6 Porter, 24. The complainants had an adequate remedy by appeal; and their failure to avail themselves of that remedy, for which they show no excuse, bars all equitable relief. They say they were minors at the time of the final settlement by the administratrix; but the record shows that they were represented by a guardian *ad litem*. They complain that the administratrix received payment of the purchase-money in Confederate States notes and bonds; but this does not invalidate the payment, and they may hold her responsible in good money.—*Waring v. Lewis*, 53 Ala. They complain, also, that they had no notice of Bocock's application for a conveyance; but this court has decided that no notice was necessary.—*Dugger v. Tayloe*, 46 Ala. 350; also, *Matheson v. Hearin*, 29 Ala. 217; 6 Porter, 233.

3. When the jurisdiction of the Probate Court, to order a sale of lands belonging to a decedent's estate, has once attached, the sale is valid until set aside, and can not be collaterally impeached on account of errors or irregularities,



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which would reverse it on appeal.—*Wyman v. Campbell*, 6 Porter, 219; *Satcher v. Satcher*, 41 Ala. 26; *Warnock v. Thomas*, 48 Ala. 465; *Bogil v. Fisher*, 2 Rich. Eq. 1; Rorer on Judicial Sales, 19.

4. The acceptance of Confederate States bonds or money by the administratrix, under the facts alleged in the bill, does not avoid the payment on the ground of force or duress. *Jeeper v. Taylor*, 47 Ala. 221; *Ferguson v. Lowry*, at June term, 1874.

5. The chancellor's decree being correct, the reasons on which it is founded are immaterial.—*Stiles v. Lightfoot*, 26 Ala. 443; *Cave v. Webb*, 22 Ala. 583; *Evans v. Gordon*, 8 Porter, 142; Freeman on Judgments, § 2.

BRICKELL, C. J.—The general rule in a court of equity is, that neither creditors, nor distributees, nor legatees, can maintain a bill against debtors of an estate, to subject debts they may owe to the satisfaction of their demands. There is a want of privity between them and the debtors, and it would introduce confusion in the administration of the assets, and displace the power of the personal representative. There are exceptions to the rule; as where there is collusion between the debtors and the personal representative; or where he is insolvent, and there is just apprehension of loss, if he is permitted to collect them; or, as is said by Chancellor Kent, in *Long v. Majestre*, 1 John. Ch. 306, "where there is some other special case not exactly defined."—1 Dan. Ch. Pr. 322-24; Story's Eq. Pl. §§ 178, 227, 514.

The averments of the present bill are not of collusion between the personal representative and the debtor, but of fraud practiced on her, and misrepresentation to her by the debtor; whereby she was induced to part with the evidences of the debt, and to accept in payment Confederate treasury-notes, and Confederate bonds; and of her insolvency, and the insolvency of her sureties. Conceding that the bill discloses a fraud and misrepresentation which will avoid the payment, the case may be regarded as an exception to the general rule, and the complainants permitted to recover of the debtor the debt the administratrix could recover.

2. The demand preferred is against Tayloe, and the relief prayed is to subject to its satisfaction the lands he acquired from Boccock. The material question is, whether there is a debt due from Tayloe to the administratrix—a debt which would have been assets in her hands for administration, and for the recovery of which she had a remedy, legal or equitable. The question must be answered negatively. Tayloe entered into no contract with the administratrix, nor had

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she at any time any evidence of debt on which he was liable as principal debtor. The contract into which he entered was with Bocock: whatever were its duties, they were owing to Bocock alone; and whatever were its benefits, were derived from him. The corresponding obligations of the contract rested on Bocock, and not on the administratrix, who in every respect was a stranger to it.

If it be said, it was Bocock's debt, which was fraudulently paid to the administratrix, and that the complainants have an equity to subject to its payment, *pro tanto*, the lands Tayloe acquired from Bocock, the purchase-money of which was the consideration of the debt; the answer is, the release to Bocock, executed by complainants, was an extinguishment of the debt. The reservation in the release is not of a right to proceed against the lands purchased by Tayloe, for any part of the debt contracted by Bocock. Such a reservation would be inconsistent with, and repugnant to the intention of the parties, as expressed in the release, to acquit Bocock from all liability on account of the debt contracted in the purchase of the lands, and to quiet the title to the lands as divided between him and the complainants. Tayloe was a purchaser from Bocock, and the bill does not negative his payment of the purchase-money. If the complainants could rightfully proceed to subject the lands he purchased to the satisfaction of the purchase-money owing by Bocock, an equity would arise at once in his favor to subject first the lands with which Bocock had not parted, including the lands he had conveyed to the complainants.—*M. M. D. & M. Ins. Co. v. Huder*, 35 Ala. 713. It is manifest, the intention of the parties in the execution of the release would be thereby defeated.

The reservation in the release is not of a right to proceed against the lands purchased by Tayloe, for any part of the debt of Bocock. It is of a right to assert against Tayloe the title of the complainants to the lands he had purchased. How far this reservation can operate, is not now a material question, and we express no opinion in reference to it. If its operation as claimed by the complainants was admitted, their title to the lands is purely legal, and the legal remedy is adequate. The decree of the Court of Probate, declaring Bocock had paid the purchase-money, is simply void, not fraudulent, if the facts are as stated in the bill. Being void, the conveyance executed in pursuance of it is a mere nullity, and is not an impediment to a recovery on the legal title at law.

Proceedings for a sale of lands by a personal representative, in the Court of Probate, are *in fieri*, until the court ren-

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• ders a decree declaring payment of the purchase-money, and directing a conveyance to the purchaser. The title of the heirs or devisees is not divested until conveyance is executed.—*Doe, ex dem. v. Hardy*, 52 Ala. 291. When the purchase-money is fully paid, the conveyance of title may be decreed on the application of the personal representative, or of the purchaser.—Code of 1876, §2468. The proceedings are *in rem*, and not *in personam*, against the heirs or devisees. The jurisdiction of the court having attached, notice to the heirs, of the application for a decree of conveyance of title, is not essential to its validity. But, if the application is by the purchaser, notice to the executor or administrator is essential, and a decree rendered without it is void. If the fact on which the decree rests, and which it must recite, is true, the personal representative loses all right to maintain an action at law, or suit in equity, for the recovery of the purchase-money, and he becomes chargeable with it in his representative capacity as assets. The statute is silent as to notice; but notice of any judicial proceeding, which is to deprive a party of rights, and impose on him liability, is essential, and is implied from the very nature of the proceeding, though it may not be expressed in the statute which authorizes it. It would be unreasonable to suppose the statute contemplates an *ex-parte* proceeding by the purchaser, whose interest it is to discharge himself from liability and obtain title to the lands.—*Brown v. Wheeler*, 3 Ala. 287; *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504; *Shiver v. Lynn*, 2 How. 43; *Hollingsworth v. Barbour*, 4 Peters, 466; *Lamar v. Gunter*, 39 Ala. 324. The case of *Dugger v. Tayloe*, 46 Ala. 320, announcing a different principle, is overruled.

The decree declaring the payment of the purchase-money, made without notice to the administratrix, being void, and not an obstacle to a recovery by the complainants at law, on their legal title, the result is, in no one of its aspects has the bill equity, and the decree of the chancellor dismissing it must be affirmed.



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## Masterson v. Bentley.

*Action on Attachment Bond, by Tenant against Landlord.*

1. *When landlord may sue out attachment against tenant's crop.*—The statute gives a landlord the right to sue out an attachment against the crop of his tenant, in two cases: 1st, "when the tenant is about to remove the crop from the premises without paying the rent;" 2d, "when he has removed it, or any portion thereof, without the consent of the landlord" (R. C. §§ 2961-63). When the crop has been removed by the tenant, without the consent of the landlord, and without paying the rent, the intent of the tenant in removing it, and the distance from the demised premises to which it is removed, are immaterial inquiries, even though it be carried to other adjacent lands belonging to the landlord.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. W. B. Wood.

This action was brought by Robert F. Bentley, against Thomas Masterson and James E. Griffin; was commenced on the 28th August, 1875; and was founded on an attachment bond, which was dated on the 27th November, 1874, and conditioned that the said Thomas Masterson, who was the plaintiff in the attachment, should prosecute his said attachment to effect, and pay the defendant therein, said Robert F. Bentley, all such damages as he might sustain from the wrongful and vexatious suing out of said attachment. The complaint set out the condition of the bond, and alleged the following breaches: 1st, that the attachment was sued out wrongfully, and without probable cause; 2d, that it was wrongfully and vexatiously sued out; 3d, that it was sued out wrongfully, vexatiously, and maliciously; 4th, that it was not prosecuted to effect; 5th, that plaintiff was not indebted to said Masterson when said attachment was sued out; 6th, that there was no cause for the issue of said attachment; 7th, "that plaintiff did not and had not, at the time said attachment was sued out, or at any other time, removed the crop raised by him on the Hillsboro place during the year 1874, or any portion thereof, without the consent of the landlord." The complaint alleged, also, that the attachment was levied on his crop of cotton and corn; that he was put to great trouble and expense in defending the attachment suit, and was greatly damaged in his business, credit, &c. The record does not show what pleas were filed; but there was a trial by jury, and a verdict for the plaintiff, under the

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charge of the court; and on the trial the defendant reserved the following bill of exceptions:

"On the trial of this cause, the evidence showed that said Thomas Masterson rented to plaintiff, R. F. Bentley, for the year 1874, lands near the town of Hillsboro in said county, and had a landlord's lien on the crops grown on said lands during said year; that he sued out an attachment to enforce said lien, and had the same levied on a part of the crop raised by said Bentley on said rented premises, and got a judgment for said rent. It was shown, also, that said Bentley, when he picked the cotton grown on said rented land, removed the same from said rented premises, and put it in an old store-house in the town of Hillsboro belonging to plaintiff, entirely off the rented premises, and some forty or fifty yards distant from the same, with a public road running between said house and said rented premises; and this was done without the consent of said Masterson. It was proved, also, that said store-house belonged to said Masterson. The plaintiff stated, in his testimony, that there was no suitable place on the rented land to store the cotton, and he obtained permission from one Lindsay, the agent of Masterson, to put it in the old store-house as it was picked out. The defendant stated, that he had never authorized his agent, said Lindsay, to consent to the removal of said cotton from the rented land to the old store-house. This was all the testimony on this point; and the court thereupon charged the jury, in words following: 'That the storing of the cotton, as it was picked, in a storehouse belonging to the landlord, on the same quarter-section of land, though not on the particular portion of the land which the tenant rented and cultivated, is not such a removal of the crop from the premises as will authorize an attachment.' To this charge the defendant excepted," and he here assigns it as error.

W. P. CHITWOOD, for appellant.

PHELAN & WHEELER, *contra*.

\* BRICKELL, C. J.—The statute confers on a landlord the right to pursue by attachment the crop grown on rented premises, when the tenant, without his consent, has removed, or is about removing, the whole, or any part of it, without payment of the rent (R. C. §§ 2961-63). Neither the intent of the tenant in removing, nor the distance from the demised premises to which the crop may be removed, is material. It is the fact of removal, or of the intent to remove, manifested by some overt act or declaration, which is the ground of at-

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tachment. The language of the statute renders it incapable of any other construction, and no other can be given it, without impairing its beneficial operation. So long as the crop remains on the rented premises, the lien of the landlord will prevail over any alienation the tenant may make of it. Whoever deals with him, is charged with notice of the lien. It is only after removal, and the tenant has a possession of the crops severed and distinct from the possession of the premises, that there may be an alienation of them to a purchaser, not having notice of the lien, which will prevail over it.—*Lomax v. LeGrand & Co.*, at the last term. Therefore, whenever, by the removal, the lien of the landlord is placed in peril—is liable to be defeated by an alienation, which could not have affected it so long as the crop remained upon the demised premises—the right of the landlord to an attachment is conferred by the statute.

Some stress seems to have been placed by the Circuit Court on the fact, that the removal of the cotton was to a house on other lands of the landlord. If the motive of the tenant in removing the crop was material, this fact would be of importance, as would also the manner of removal—whether it was open or clandestine. But this motive is immaterial. The cotton was not placed in the possession of the landlord—it was removed from the rented premises, and was the subject of an alienation by the tenant, which would have defeated the lien of the landlord, and which could not have been made while the crop was on the premises.

The charge given by the Circuit Court was erroneous; and the judgment must be reversed, and the cause remanded.

## Chapman v. Holding.

### *Statutory Action in Nature of Ejectment.*

1. *Rulings on demurrer; when revisable.*—Rulings of demurrer, not shown by the judgment, though copied in the transcript by the clerk, are not revisable on error.

2. *Competency of husband, as witness for wife.*—The husband is a competent witness for the wife, where his testimony does not relate to any communication made between them, nor tend to violate the sacred confidence of the marital relation.

3. *Sufficiency of verdict for plaintiff.*—In ejectment, or a statutory action in the nature of ejectment, issue being joined on the plea of not guilty, without any disclaimer as to a part of the premises, a verdict finding the issues for the plaintiff is a verdict for the entire premises, and is sufficient: it is only



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when the verdict is for less than the entire premises sued for, that it is necessary to describe the part found for plaintiff.

4. *Blank forms of verdict for jury.*—The practice has long prevailed of instructing the jury orally, as to the proper form of verdict, and it is unobjectionable; nor is it erroneous to give them blank forms in writing, to be used according to their finding on the facts.

5. *Motion in arrest of judgment, or for judgment non obstante veredicto; when not grantable.*—When there is a general verdict for the plaintiff, and no repugnance between it and the plaintiff's pleadings, the defendant can not move in arrest of judgment, nor have judgment entered *non obstante veredicto*, on the ground that some of the plaintiff's documentary evidence shows that the verdict finds inconsistent facts: this would be, at most, only matter to be considered on motion for a new trial.

6. *Conveyance of land adversely held.*—A conveyance of lands which are at the time in the possession of a third person, holding adversely to the grantor, is void, and the grantee can not recover on it in an action at law against such adverse holder.

7. *Charge requiring explanation.*—A charge given by the court, which asserts a correct proposition of law, but, under some tendencies of the evidence, requires an additional explanatory charge, is not a reversible error: it is the duty of the party complaining of it to ask the proper explanatory charge.

8. *Verdict against charge of court.*—That the jury, by their verdict, have disregarded the charge of the court, is not error but is good matter for a motion for a new trial; and the ruling of the primary court on such motion is not revisable on error.

9. *Exception; sufficiency of.*—When the bill of exceptions states that "the court gave the jury in charge, against the objection of the defendant, the following instructions" as to the form of their verdict, it is doubtful whether this shows a sufficient exception; and if sufficient, it is to the instructions as a whole, and can not be sustained, if any part is correct.

FROM the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by William M. Holding and his two sisters, Mrs. Mary E. Hundley (the wife of Orville M. Hundley), and Mrs. Mattie Fletcher (the wife of A. S. Fletcher), against Reuben Chapman, to recover the possession of a small strip of land, eight or ten feet wide by thirty-three feet six inches long, together with damages for its detention; and was commenced on the 23d September, 1871. The complaint was in the form given in the Revised Code (p. 677), and the lot sued for was thus described: "Beginning at a point on the line between the building known as the 'Dick Holding Block,' on the east side of the public square in the city of Huntsville, and the building on the east side of said public square now being erected by the defendant, forty-eight feet from said public square; thence north, 56° east, on the line of said 'Dick Holding Block,' ten feet; thence south, 34° east, parallel with the east side of said public square, thirty-three feet and six inches; thence southwestwardly, at right angles to said public square, ten feet; thence northwestwardly, and parallel with the public square, to the beginning." At the May term, 1875, the original complaint having been lost, another was substituted for it by leave of the court, "and on the agreement of the

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parties;" and in this substituted complaint the land was thus described: "Beginning on the northern wall of the Chapman building, forty-eight feet, at right angles to the public square in the city of Huntsville; thence on said boundary produced, eight feet five inches; thence, at right angles to said northern boundary, and parallel with the public square, thirty-three feet eleven inches; thence, at right angles to said last-mentioned line, eight feet five inches, to a point forty-eight feet on the nearest and most direct measurement from the public square; thence, at right angles to last line, and parallel with the public square, thirty-three feet eleven inches, to the place of beginning."

The defendant pleaded, 1st, not guilty; and on this plea issue was joined. He pleaded, also, "2d, that he and those whose possession he has, for three years next before the commencement of this suit, had adverse possession of the premises sued for; and the defendant suggests, that, before the commencement of this suit, he had made valuable permanent improvements on the said premises, of the value of \$8,000." To this plea the plaintiffs replied, "that plaintiffs gave notice of their claim before defendant erected said improvements;" to which replication defendant demurred, "because the alleged notice, if true, does not preclude the defense interposed by said second plea;" beneath which demurrer, as copied in the transcript, are the words, "Demurrer sustained," followed by the name of the presiding judge. The plaintiff then replied to said second plea, "that before and at the time said improvements were erected, plaintiffs were in actual possession of said lands, claiming under a deed describing the same by metes and bounds, and which was duly recorded in the office of the probate judge of said county; and before and at the time defendant erected said improvements, plaintiffs notified him of their possession and claim, and warned him not to build on said land." On this replication the defendant took issue. The defendant pleaded, also, the statutes of limitations of ten and twenty years, and issue was joined on each of these pleas; and his fourth plea, on which also issue was joined, was, "that his vendor was in actual and adverse possession of the premises sued for, at and before the same were conveyed to plaintiffs by their grantors." The defendant pleaded, also, "5th, that the division line, according to which he has possession, had been agreed upon, and possession had according to it, for ten years, by the owners of the contiguous lots, before plaintiffs had acquired any title or interest therein, and plaintiffs are bound by such agreement, possession, and acquiescence." To this plea the plaintiffs demurred, "because said plea



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does not show that plaintiffs, or those through whom they claim, were parties to said agreement, and because said plea is vague and indefinite." Beneath this demurrer, as set out in the transcript, are these words: "Demurrer sustained to fifth plea, to which defendant excepts," followed by the name of the presiding judge.

The defendant then filed another plea, which was as follows: "6. By leave of the court first had and obtained, upon sustaining the plaintiffs' demurrer to the defendant's 5th plea, above pleaded, the defendant pleads over, and says, in short by consent, that a long time before the institution of this suit, the parties through whom the plaintiffs claim, and the parties through whom the defendant claims, whilst said parties were the owners, and were in possession of the contiguous lots, the division line of which is involved in this suit, agreed upon and established a division line between their said respective lots; and according to the division line so established, and according to said agreement, between the vendors of the plaintiffs and the vendors of the defendant, the defendant and those under whom he claims have held and possessed the property sued for, ever since the said agreement and establishment of said division line, and that plaintiffs are bound by said agreement, possession, and acquiescence." To this 6th plea the plaintiffs filed three replications, as follows: 1. "That the grantors through whom they claim have been in adverse possession of said lands, as described in plaintiffs' complaint, for more than twenty years, under deeds describing them by metes and bounds, courses and distances; and said plaintiffs and their grantors have been in the actual and adverse possession of all the lands mentioned and described in said deeds, for more than twenty years." 2. "That if there was in truth a division line agreed on between the vendors of the plaintiffs and the defendant, as alleged in said 6th plea, the same was abandoned by the parties thereto, long anterior to this suit." 3. "That if there was in fact a division line agreed on between the vendors of plaintiffs and defendant, as alleged in said 6th plea, plaintiffs and their vendors had no notice thereof, either before or at the time of their purchase; that they purchased all the land described in their complaint, paid the purchase-money therefor, and went into possession thereof, under their deed; and they have remained in possession ever since, until the defendant entered upon and claimed the land in controversy; and that plaintiffs are innocent purchasers without notice." The defendant took issue on each of these replications.

The pleadings as above set out, and the several rulings of



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the court on the demurrers, though copied in the transcript by the clerk, are not noticed in the bill of exceptions, and do not appear in the judgment-entry, which only recites the appearance of the parties, the impanneling of a jury, &c. On the trial, as the bill of exceptions shows, the plaintiffs offered in evidence a deed to themselves from Mrs. Mary S. Calhoun and her husband, Meredith Calhoun, and their two children, William S. and Ada Calhoun, which was dated the — day of March, 1869; and, in connection with said deed, proved that Mrs. Calhoun was the only grand child of William Smith, deceased, and inherited from him all his property. In this deed, the land conveyed was described as “parts of lots numbered 33, 34, 37, and 38, on the city map,” with description by metes and bounds, courses and distances, as copied from a survey made by H. L. W. McClung. The plaintiffs also introduced a deed from one Campbell to said William Smith, dated the 12th March, 1825, conveying certain lands therein described as “lot No. 34 and parts of lots Nos. 33, 37, and 38,” and designated by boundaries; and several other conveyances, which it is unnecessary to describe. The defendant claimed under a conveyance from Milton Humes, as the administrator of the estate of George Steele, deceased; and he introduced in evidence several deeds tracing the title of said Steele back to the year 1817. All of these deeds conveyed a lot or lots by numbers, metes and bounds, and other particular descriptions, which it is unnecessary to copy. The material question in the case seems to have been as to the depth of Steele’s lot, and whether it included the strip of land here sued for. M. W. Steele, who, as executor of the last will and testament of said George Steele, had the management and control of his estate for several years, testified, on the part of the plaintiffs, “that a brick wall was erected in 1835, by said William Smith, who was then the owner of the property which now belongs to the plaintiffs, as the dividing line between plaintiffs’ lot and defendant’s lot; that said wall, after its erection, was always recognized by the respective owners of said lots, as the dividing line; that a portion of this wall was still visible, at the close of the war, when he gave up the management of said estate, although it had been torn down, and almost entirely destroyed, during the war; that whilst he was executor of said estate, he held possession of said lot, and claimed without objection from any one, running back to said wall; that said brick wall was forty-seven feet, and no more, from the public square, for the length of the whole line here in dispute; that he had the lot surveyed from all the deeds under which plaintiffs and defendant de-

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rive title, with the view of getting into the division wall one foot, intending to erect two stores, but ascertained, by said survey and measurement, that he was only entitled to forty-seven feet." A. R. Wiggs, another witness, with whom said Steele proposed erecting stores on the lot for their joint benefit, testified that, "at the time spoken of, there was a portion of said brick wall along the line of dispute in this suit; that forty-seven feet did not go back as far as the wall; that said Steele said nothing about the wall; that, according to his recollection, there was a short space between the back of the Steele lot and the wall; that he did not know exactly how much, but supposed it was about six or eight feet." Other evidence was introduced, on both sides, bearing on this question. It appeared that, after the destruction of the brick wall, a plank fence was erected as the dividing line between the two lots; and the defendant always claimed to own, from the time of his purchase, up to this fence. Whether this fence was on the site of the old wall was a disputed question.

"The plaintiffs introduced O. M. Hundley as a witness, whose wife was one of the plaintiffs; and the defendant objected to his competency on that ground. The court overruled the objection, and allowed the witness to testify; to which the defendant excepted. Said witness testified, that he had measured the depth, from the public square, of the lot occupied, claimed, and in the possession of the defendant; and that from the outside wall on the public square, to the exterior of the porch in the rear of the defendant's building, was fifty-six feet, five inches." "A. S. Fletcher, the husband of said Mattie Fletcher, was also introduced as a witness for the plaintiffs; and the defendant objected to his competency, because his wife was one of the plaintiffs; which objection the court overruled, and the defendant excepted. Said witness testified, that the value of the parcel of land sued for was from \$600 to \$800; that it would take \$150 to fill up the excavation dug by the defendant, and that the value of the rent was \$10 *per annum*."

The bill of exceptions purports to set out all the evidence, and then proceeds as follows: "The court charged the jury, that there was but one fact in the case, and that was the ascertainment by them where the brick wall which was torn down, and the plank fence erected on its foundation, stood; it being conceded by both parties that this was the line of division between their respective lots, and that there was no principle of law involved in the case."

"The plaintiffs then asked the court to give the following charges, which were written, and which the court gave:

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1. "Where the objects which marked one of the original boundaries of a lot are lost, you must, in establishing the lost boundary, be governed by the courses and distances given in the deed." 2. "Where there are known monuments in existence, to control the boundaries given in the deed, then you must follow the courses and distances given in the deed, wherever they conduct, and stop wherever they stop, without departing from either; and the lines established in the deeds by course and distance must be taken as the true boundary."

"The defendant then asked the court to give the following charge, which was in writing, and which the court gave: 'The law declares that, in an ejectment suit, the plaintiffs must recover on the strength of their own title, and not on the weakness of their adversary's title; and unless the plaintiffs have proved that, at the time the deed was made to them, their vendor was in possession of the land sued for, claiming the same, or exercising acts of ownership over it, plaintiffs can not recover, even against a party in possession without any paper title; and still less can they recover against a party in possession with a paper title.'

"Immediately before the jury retired to consider of their verdict, the court gave them in charge, against the objection of the defendant, the following three forms for verdict; instructing them that they were proper forms for verdicts in such a case, and that they could bring in their verdict in one of said three forms so given them, and they should render their verdict in one or the other of said forms, as they found the facts to be. Said forms were the following:

"*Form No. 1.*—'We, the jury, find the issues joined in favor of the plaintiffs. We also find that the suggestion of the defendant, of adverse possession for three years and improvements, is untrue, and assess the plaintiffs' damages at \_\_\_\_\_ dollars.'

"*Form No. 2.*—'We, the jury, find for the plaintiffs on the issues joined. We also find that the suggestion of the defendant, that for three years next before the commencement of this suit he and those whose possession he has had adverse possession of the land sued for, is true; and we assess the value, at the time of this trial, of the permanent improvements made by the defendant, or those whose estate he has, at the sum of \_\_\_\_\_ dollars. We further ascertain the value of the land sued for, at the sum of \_\_\_\_\_ dollars; and we also ascertain the value of the use and occupation of said land, not including the increased value thereof by reason of such improvements, at the sum of \_\_\_\_\_ dollars, to the time of this verdict.'



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"Form No. 3.—'We, the jury, find the issues joined in favor of the defendant.'

"The court instructed the jury, also, in the event of their finding for the plaintiffs, to state in their verdict, whether for the whole or any part of the premises sued for, to specify how much, and what part."

The jury returned the following verdict: "We, the jury, find for the plaintiffs on the issues joined. We also find that the suggestion of the defendant, that for three years next before the commencement of this suit he and those whose possession he has had adverse possession of the land sued for, is true; and we assess the value, at the time of this trial, of the permanent improvements made by the defendant, or those whose estate he has, at the sum of \$150. We further ascertain the value of the land sued for, at the sum of \$625; and we also ascertain the value of the use and occupation of said land, not including the increased value thereof by reason of such improvements, at the sum of \$30, to the time of this verdict."

The defendant moved for a judgment in his favor, *non obstante veredicto*, and also in arrest of judgment. The former motion, as copied in the bill of exceptions, craves oyer of the summons and complaint, the fourth plea, the deed from the Calhouns to the plaintiffs, the deed to the defendant from his grantor, the charge given by the court to the jury on the request of the defendant, and the verdict of the jury; and then proceeds thus: "And now, upon said summons and complaint, which show on their face this suit to have commenced on the 23d September, 1871; and upon said deed of conveyance to the plaintiffs, which shows upon its face the title of the plaintiffs to commence and vest in them, and that of their grantors to divest and cease, on the — day of March, 1869; and upon the said plea, that the defendant's vendor was in actual adverse possession of said premises, at and before the same were sold and conveyed to plaintiffs by their grantors; and upon the said deed of conveyance to the defendant; and upon the finding in said special verdict, that, for three years next before the commencement of this suit, the defendant and those whose possession he has have had adverse possession of the land sued for; and upon said charge of the court,—the defendant moves the court to enter up a judgment for him, *non obstante veredicto*; and the defendant further moves the court, upon all of said record herein before set out, to enter up judgment for him—1st, because the plaintiffs' case, as thereby shown, is a defective case; 2d, because the plaintiffs' title, as thereby shown, is a defective title; 3d, because it is thereby shown that the

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defendant's vendor was in actual and adverse possession of the premises sued for, at and before the same were sold and conveyed to plaintiffs by their grantors; 4th, because it is thereby shown that the deed of conveyance to plaintiffs from their grantors, under and by virtue of which they claim title to the premises sued for, is absolutely null and void." The motion in arrest of judgment was in the same form, and based on the same grounds, in addition to the following: "5th, because the verdict does not contain such specification and description of the land sued for, as by law authorized the entering up of a judgment thereon for the plaintiffs." The court overruled each of these motions, and the defendant excepted to each ruling and refusal. The defendant also made a motion for a new trial, on the ground that the verdict was contrary to the charge of the court, and contrary to the evidence; and because the second form of verdict given by the court to the jury, being the form which they adopted, was erroneous, calculated to mislead the jury, and insufficient to sustain a verdict for the plaintiff; which motion, also, the court overruled and refused.

The following errors are now assigned: 1. Permitting O. M. Hundley to testify as a witness for the plaintiffs. 2. Permitting A. S. Fletcher to testify as a witness for the plaintiffs. 3. "Giving in charge to the jury, immediately before they retired to consider of their verdict, against the objection of the defendant, the three forms of verdict set out in the record, and instructing them that they were proper forms of verdict in such a case, and that they could bring in their verdict in one of said three forms, and should render their verdict in one or the other of said forms, as they found the facts to be." 4. Giving said three forms to the jury, against the objection of the defendant. 5. Overruling the defendant's motion to enter up a judgment in his favor, *non obstante verdicto*. 6. Overruling the motion in arrest of judgment. 7. The judgment rendered on the verdict.

L. P. WALKER, with HUMES & GORDON, for appellant.—1. The court erred in permitting Hundley and Fletcher to testify as witnesses for the plaintiffs. They were the husbands of two of the plaintiffs, and were incompetent to testify as witnesses for their wives. The incompetency rests on principles of public policy, and is not founded on any supposed interest; consequently, the incompetency is not removed by the statute (Rev. Code, § 2704) which abolishes the common-law rule as to disqualification on account of interest.—1 Greenl. Ev. §§ 334, 341; *Sadler v. Houston*, 4 Porter, 208; *Wilson v. Sheppard*, 28 Ala. 623; *Walker v. Walker*, 34 Ala.

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469. The precise point has been decided by the Supreme Court of the United States, and by the highest courts in several States.—See *Lucas v. Brooks*, 18 Wallace, 436-52; *Pease v. Allis*, 110 Mass. 157; *Kelly v. Proctor*, 41 N. H. 139; *Breed v. Gore*, 41 N. H. 452; *Stanley v. Stanton*, 36 Indiana, 445; *Marshman v. Conklin*, 2 Greene, N. J. 282; *Cramer v. Redfield*, 1b. 367; *Galway v. Fullerton*, 1b. 389; *Manchester v. Manchester*, 24 Vermont, 649.

2. The court erred, also, in giving to the jury the blank forms of verdict, to which the defendant objected at the time. The first form was an absolute verdict for the plaintiff, and the third an absolute verdict for the defendant; while the second took middle ground, and was a compromise verdict,—just such a verdict as the jury would be likely to adopt, when told that there was no law in the case, and which they did in fact adopt. The defendant objected to the action of the court in giving these blank forms to the jury; and in such case, an objection is sufficient.—*Sackett v. McCord*, 23 Ala. 851; *Chamberlain v. Masterson*, 29 Ala. 299; *Gager v. Gordon*, 29 Ala. 341.

3. The verdict is inconsistent with itself, repugnant, and self-contradictory. The only deed under which the plaintiffs showed title in themselves, is dated less than three years before the commencement of the suit; and the court properly instructed the jury that, if the defendant was in the adverse possession of the land at the time said deed was executed, it was null and void, and plaintiffs could not recover on it.—*Bernstein v. Humes*, at the present term. Yet, the verdict finds for the plaintiffs on the issues joined, and also finds in favor of the defendant's suggestion of the erection of permanent improvements under adverse possession for more than three years, which antedates the commencement of the plaintiffs' title. On this state of facts, the defendant was entitled to have a judgment entered in his favor, *non obstante verdicto*; and the court erred in overruling his motion to that effect.—*Snyder v. Robinson*, 35 Indiana, 311, or 9 Amer. 738; *Weed & Clark v. Black*, Central Law Journal, January, 1876, p. 34; *Lee v. Campbell*, 4 Porter, 204; *Dyer v. Greene*, 23 Maine, 464; *Brown v. Ferguson*, 4 Leigh, 39, 55-6; *Ballows v. Augusta Bank*, 2 Mason, 31-42; *Sullenberger v. Gest & Mills*, 14 Ohio, 204; *Smith v. Walker*, 1 Wash. 135; *Shanks v. Albert*, 47 Indiana, 461; *Brown v. Ralston*, 4 Rand. Va. 518; *Harbaugh v. Cicott*, 33 Mich. 241; 1 Mason, 153.

4. These authorities show, also, that the motion in arrest of judgment ought to have been granted; and since the record shows all the facts, it is the duty of this court to render such judgment as the court below ought to have ren-



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dered.—Rev. Code, § 3502; *Campbell v. May*, 31 Ala. 567; *Bibb v. Hitchcock*, 49 Ala. 468; *McKenzie v. Baldrige*, 49 Ala. 564.

5. The verdict was fatally defective, because it did not describe the premises found for the plaintiff.—Rev. Code, § 2618; *Sawyer v. Fitts*, 4 Stew. & P. 365; *Koon v. Nichols*, 63 Illinois, 163; *Rawlings v. Bailey*, 15 Illinois, 178; *Patterson v. Hubbard*, 30 Illinois, 201.

BRANDON & JONES, *contra*.—1. The incompetency of the husband to testify as a witness for or against the wife, on grounds of public policy, is founded on the sanctity of the marital relation, and extends only to confidential communications between them.—1 Greenl. Ev. §§ 334, 337, 338; 1 Phil. Ev. 69; 6 East, 188; 1 B. Monroe, 224; 4 John. 230; 5 John. 144; 7 Dana, 90; *Coffin v. Jones*, 13 Pick.; *Williams v. Baldwin*, 7 Vermont; 4 Barr, 364; *Wells v. Tucker*, 3 Binney, 366; *May v. Little*, 3 Ired. N. C. 27; *Sanders v. Hendrix*, 5 Ala. 224. So far as the rule of exclusion is founded on interest, it is removed by the statute.—Revised Code, § 2704; *Robinson v. Robinson*, 44 Ala. 227; *Rowland & Co. v. Plummer*, 50 Ala. 182; 2 Kent, 79; 10 John. 38.

2. The defendant can not move for a judgment *non obstante veredicto*: only the plaintiff can make that motion.—2 Tidd's Practice, 904, 922; 1 Chitty's Pl. 657, 10th Amer. ed.; *Schermerhorn v. Schermerhorn*, 5 Wendell, 514; *Bellows v. Shannon*, 2 Hill, 86; 4 Taunton, 821; 6 Taunton, 305; 8 Taunton, 413; 1 Moore, 199; 2 Moore, 464; 2 Barn. & Ald. 560; 2 Barn. & Cress. 678; 13 Price, 434; 6 Dow. & Ry. 188; 11 N. H. 226. The case of *Da Costa v. Clarke*, 2 Bos. & P. 257, is the only case in which such a motion by the defendant has been sustained; and that was an action of replevin, in which the pleadings are different from other actions.

3. A motion in arrest of judgment can only be based on matter appearing on the face of the record; and it will not be granted on account of any defect which, after verdict, is cured by the statute of jeofails.—2 Tidd's Practice, 918; Stephens' Pl. 97. The matters set up by the defendant in arrest of judgment, were only available on motion for a new trial; and the action of the court on that motion is not revisable.

4. The verdict was general, and entitled the plaintiffs to a judgment for the entire premises.—*Clay v. White*, 1 Munf. 162; *Paul v. Smiley*, 4 Munf. 468; *Farrow v. Farrow*, 2 J. J. Mar. 388; *Doe v. Wilson*, 2 Starkie, 477; 5 Litt. 322; *McMurray v. O'Neal*, 1 Call, 216; 9 B. Mon. 240; 4 Bibb, 285; *Hamner v. Eddins*, 3 Stew. 192; 10 Mass. 64.

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STONE, J.—The rulings on demurrer not being shown in the judgment of the court, we cannot consider them.—*Petty v. Dill*, 53 Ala. 641.

2. The husbands of two of the plaintiffs were called to testify for them. Their testimony did not at all relate to any communications made by one to the other; and it did not tend to disclose any fact or circumstance connected in the least with that sacred confidence between husband and wife, which should always be respected. We think the objection to the competency of the witnesses was not well taken.—*Robinson v. Robinson*, 44 Ala. 227; *Lung v. Waters*, 47 Ala. 624.

3. The complaint describes the lands sued for, with minute particularity, alike as to boundaries and quantity. The plea of not guilty was an admission of defendant's possession; and there was no disclaimer as to any part. The issues found all go to the entire premises sued for. The description in the complaint, and the issues formed upon it, sufficiently describe the property, to prevent mistakes in its location and identification. The language of the verdict was: "We, the jury, find for the plaintiff, on the issues joined." The issues joined were, an affirmation by the plaintiffs that the premises sued for—the premises as described—were the property of plaintiffs, wrongfully possessed and held by the defendant; and an admission by defendant that he was in possession, with a denial of plaintiffs' ownership and right of recovery. Finding the issues in favor of plaintiff is as definite and determinate, as if the verdict had affirmed that the jury found for the plaintiff the lands described in the complaint; and it was a finding of all that was claimed in the complaint, except those parts which the verdict affirmed was not so found.—See *Hamner v. Eddins*, 3 Stew. 192; *Sawyer v. Fitts*, 2 Por. 9; *S. C.*, 4 Stew. & Por. 365, 370; *Hines v. Greenlee*, 3 Ala. 73. It is only when the jury find for the plaintiff, less than the quantity sued for, that the verdict must describe the part of the premises recovered. We think the verdict sufficient.—Code of 1876, § 2967.

4. There was no exception to any part of the charge to the jury, nor to the several blank forms of verdict furnished by the court, so varied as to present every conceivable form of their finding. If this had been excepted to, we can perceive nothing in it which would have misled the jury. The custom, sanctioned alike by principle and practice, has long prevailed, of instructing juries as to the proper forms of their verdicts. If such instruction, orally given, be free from error, it is difficult to conceive how reducing it to

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writing can vitiate it. We think such practice is not only free from objection, but that it is commendable.

5. The only remaining questions are those which arise out of motions made after verdict; first, for judgment for the defendant, *veredicto non obstante*; and, second, to arrest the judgment and set aside the verdict, because the latter is inconsistent in its findings, and repugnant to itself. An insuperable obstacle to the maintenance of either of these propositions is found in the fact, that there is nothing incompatible or repugnant in the verdict of the jury, when considered by itself, or taken in connection with the pleadings. Counsel for the motion perceived this difficulty, and sought to obviate it, by bringing before the court, on oyer, not only the process by which the suit was commenced, but part of the documentary evidence by which plaintiffs proved their title. They have shown great industry in search of authorities to sustain their views, and, among others, have cited the following: *Snyder v. Robinson*, 35 Ind. 311; *S. C.*, 9 Amer. Rep. 738; *Dyer v. Greene*, 23 Me. 464; *Brown v. Ferguson*, 4 Leigh, 37; *Bellows v. H. & A. Bank*, 2 Mason, 31; *Sullenberger v. Gest*, 14 Ohio, 204; *Smith v. Walker*, 1 Wash. Va. 135; *Shanks v. Albert*, 47 Ind. 461; *Harbaugh v. People, ex rel.*, 33 Mich. 241; *Stearns v. Barrett*, 1 Mason, 153; *Brown v. Ralston*, 4 Rand. 504, 518.

None of these cases sustain the view contended for. In the case of *Brown v. Ralston*, the court drew the proper distinction, between motions and orders thereon, in arrest of judgment, and orders granting new trials. It was there said: "They differ in this—that the *venire facias* is the ancient proceeding of the common law; the new trial, a modern invention to mitigate the severity of the proceeding by attainct. New trials are generally granted, where a general verdict is found; a *venire de novo*, upon a special verdict. The most material difference between them is, that a *venire* must be granted upon matter appearing upon the record; but a new trial may be granted upon things out of it."

In the present case, the pleadings and verdict show a complete right of recovery. The verdict is general—not a special finding of facts. It is only by bringing before the court a part of the evidence, that it is claimed that the verdict finds inconsistent facts; and on the strength of which, the motions above stated were pressed. It furnishes no ground for a judgment for defendant, *veredicto non obstante*; and it furnishes no ground for arrest of judgment proper, either in the Circuit Court, or this court. The most that can be affirmed of it is, that it afforded matter for consideration on a motion for a new trial. From circuit rulings on such



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a motion, no appeal lies to this court.—2 Brick. Dig. 276, §§ 1, 2, 3.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

*Note by Reporter.*—On a subsequent day of the term, the appellant's counsel having filed an application for a rehearing (on points shown by their brief, *ante*), the following opinion was delivered.

STONE, J.—A very ingenious argument has been made, tending to show that the second skeleton form of verdict, submitted by the court to the jury, was calculated to mislead, and did mislead them, as shown by the verdict they rendered. The point of the argument is, that the deed to the Holdings, under which they claim title, shows on its face that they acquired title less than three years before the suit was brought; and inasmuch as the jury found in favor of defendant's suggestion, that "he and those whose possession he had, for three years next before the commencement of the suit, had had adverse possession thereof," this shows that plaintiffs were not entitled to recover; because, when the Holdings purchased, the property was adversely held by another, which is a complete defense to their action.—*Bernstein v. Humes*, at the present term. In other words, the argument is that, under the testimony given, this charge could not properly be given; but that the jury should have been instructed, if they found there had been three years adverse possession, then they must find for the defendant.

If this question was properly presented by the record, we would hold that the court should have charged the jury, that if the property sued for was adversely held and occupied, at the time plaintiffs acquired their title, then their verdict should be for the defendant.—*Humes v. Bernstein*, *supra*. The record is silent as to whether this charge was or was not given. We are bound to presume the Circuit Court correctly instructed the jury in matters of law, unless the record affirmatively shows the contrary.—1 Brick. Dig. 345, § 143; *Ib.* 781, §§ 118, 120; *Ib.* 782, § 125; *Ib.* 783, §§ 141, 143, 146, 147, 148, 149; *Ib.* 784, §§ 150, 151, 154, 155. If the court correctly charged the jury, on matters of abstract law, and there were tendencies of the evidence which rendered it proper that other and explanatory charges should be given, then it was the duty of the counsel to direct the attention of the court to the subject, and ask proper explanatory charges.—*Dave v. The State*, 22 Ala. 23; *Farley v. Smith*, 39 Ala. 38; *Wolfe v. Parham*, 18 Ala. 441; 1 Brick. Dig. 344,

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§ 129. Assuming that the court correctly charged the jury, on all questions, not shown to the contrary by the record, the only inference is, that the jury must have disregarded the charge of the court, as to the effect of adverse possession on plaintiffs' right of recovery. Such error can only be redressed by granting a new trial; and of such motion, this court possesses no revisory jurisdiction.—2 Brick. Dig. 276, § 1.

What we have said above shows, that if there had been a distinct and separate exception to the form of verdict numbered 2, given by the court, it would scarcely furnish ground for a reversal. But there are two obstacles in the way of considering the question on the present record. The language of the bill of exceptions is: "Immediately before the jury retired to consider of their verdict, the court gave them in charge (against the objection of defendant) the following three forms of verdict, instructing them that they were proper forms of verdicts in such a case," etc. Forms 1 and 3 are free from objection, under the evidence in the record. Form 2 is alone objected to. It is doubtful if the words, "against the objection of defendant," are sufficient to reserve an exception.—*Gager v. Doe, ex dem.*, 29 Ala. 341. But an exception, to receive consideration, must point out—direct the attention of the court to—the specific ruling complained of.—*Johnson v. McGehee*, 1 Ala. 186. And a general exception to a mass of evidence, some portion of which is legal, or to a lengthy charge, or several charges, some separable parts of which assert correct legal propositions, is no ground for reversal—*Rives v. McLosky*, 5 Stew. & Por. 330; 1 Brick. Dig. 250, §§ 111, 113; *Holland v. Barnes*, 53 Ala. 83; *Owens v. The State*, 52 Ala. 400; *Cohen v. State*, 50 Ala. 108. Conceding that the exception in this case was sufficiently reserved, it is taken to the entire three forms of verdict, two of which are unquestionably correct, under any phase of the testimony. The exception should have designated the part of the charge objected to, so that the court could pronounce on the direct question, by correcting or modifying its rulings or not, as its quickened attention might suggest. The objection in this case was only calculated to create the impression, that, in the opinion of counsel, the court erred in giving to the jury skeleton forms of verdict, to meet any conclusion they might arrive at, in weighing the evidence. In our first opinion we showed that the Circuit Court did not err in this.

The application for a rehearing is overruled.

[Lomax v. LeGrand &amp; Co.]

**Lomax v. LeGrand & Co.***Special Action on the Case, by Landlord against Purchaser of Tenant's Crop.*

1. *Landlord's lien, and attachment against tenant's crop; distinguished from distress for rent at common law.*—The landlord's statutory lien on his tenant's crop, with the remedy by attachment given for its enforcement (Rev. Code, §§ 2961-63), unlike the right to distrain for rent at common law, does not cease at the expiration of the term, and is not impaired by the removal of the crop from the rented premises, but continues until the crop passes into the possession of a purchaser without notice.

2. *Same; when purchaser is chargeable with notice.*—Actual knowledge is not necessary to charge a purchaser from the tenant with notice of the landlord's lien on the crop: whatever is sufficient to put him on inquiry, is also sufficient to charge him with notice.

3. *Same.*—The tenant having executed a mortgage on the "entire crop of cotton and corn which may be made during the present year, on the plantation in said county known as Mrs. C. L.'s plantation, which I" [the mortgagor] "am cultivating the present year;" this recital is notice to the mortgagee of the relation existing between the tenant and Mrs. C. L.; and notice of the relation is also notice of the landlord's statutory lien.

4. *Same.*—The lien is the creature of the statute, and incident to the relation, and is not matter of contract, although it may be waived or relinquished by contract; but, to charge a purchaser with notice of it, it is not necessary that he should know the terms of the contract between the landlord and tenant, or the stipulated amount of rent.

5. *Same.*—The fact that the crops are on the rented premises, is notice to all the world of the lien attached to them: it is only after their removal from the premises, when the tenant has possession of them distinct from his possession of the premises, that he can sell and convey a good title to the purchaser; and where, having executed a mortgage on them before they were grown, whose recitals are sufficient to charge the mortgagee with notice, he removes them from the premises, and delivers them to the mortgagee, the latter can not claim protection as a purchaser without notice.

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APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This action was brought by Mrs. Caroline A. Lomax, against M. P. LeGrand & Co., and was commenced on the 27th January, 1873. It was a special action on the case, claiming \$1,500 as damages, for that whereas the plaintiff, on the 1st January, 1872, rented a certain plantation in Montgomery county, for and during the year 1872, to one J. P. Houser, at and for the stipulated rent of \$1,350, payable in three equal installments, of \$450 each, on the 15th October, the 15th November, 1872, and the 1st January, 1873; and the said Houser entered on the lands under said contract, and cultivated them during the year, and raised a large crop of cotton, to-wit, fifty bales, on which plaintiff had a statu-



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tory lien for the payment of the rent as stipulated; and said Houser, having removed said cotton from the rented lands, without the consent of the plaintiff, and without paying the agreed rent (except \$213.20, a portion thereof), delivered the same to said LeGrand & Co., who had notice of plaintiff's lien, and who nevertheless received and sold the cotton to other persons, unknown to plaintiff, and who had no notice of her lien; whereby plaintiff's lien was lost and destroyed, and she was injured, &c. The defendant pleaded the general issue, and issue was joined on that plea; and on the trial, there was a verdict and judgment for the defendant, under the charge of the court, the plaintiff reserving the following bill of exceptions:

"It was proved that the plaintiff had, for more than twenty years, owned a plantation in said county, about four miles from the city of Montgomery; that in January, 1872, she rented the same to J. P. Houser for the year 1872, taking a written contract, by which he agreed to pay the rent in three equal installments, to-wit: \$450 on the 15th October, \$450 on the 15th November, and \$450 on the 1st January, 1873; that said Houser entered on said place under said contract of renting, and cultivated it during that year, making about sixty bales of cotton thereon; and that he did not deliver any of said cotton, or other crops raised on said place, to plaintiff, but paid her in money, in the latter part of October, 1872, about \$200, which was all he had ever paid on account of said rent. On the 25th April, 1872, said Houser executed a mortgage to defendants;" which was made an exhibit to the bill of exceptions, and which, after setting out an indebtedness of \$2,849.39 for advances made to him by LeGrand & Co. to enable him to make a crop, as evidenced by his promissory note, of even date with the mortgage, and his promise to deliver to them seventy-five bales of cotton by the 15th November, 1872, conveyed as security the following property: "The entire crop of cotton and corn which may be made and grown during the present year on the plantation in Montgomery county, known as Mrs. C. Lomax's plantation, which I am cultivating the present year; also, the following mules and horses," &c. "The evidence further showed, that said Houser made over sixty bales of cotton on said place during that year, all of which, except what he let LeGrand have, he disposed of, and sold to whom he pleased, in the usual way, hauling it to the city, and selling it openly, without any attempt by plaintiff to prevent it. But plaintiff swore, that she knew nothing of this: that she was absent from home, with the exception of three days, from about the 1st August to the 15th October, and had no

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agent in the city. The evidence showed, also, that said LeGrand had lived in Montgomery for many years, and knew that said plantation belonged to plaintiff; and that before he sold the goods to said Houser, and before he took said mortgage, he knew that said Houser was occupying said plantation as plaintiff's tenant. But said LeGrand swore, that he did not know the terms of the contract of renting, nor whether the rent had been paid cash, or was still due; that he never made any inquiry of the plaintiff, or any other person, about the terms of the renting, and that he had no knowledge of the plaintiff's lien on the cotton at the time he received and sold it.

"The evidence showed, also, that during the fall, commencing the latter part of August, and up to about the 1st November of that year, Houser delivered to defendant twenty-six bales of said cotton, brought into Montgomery by the wagon-load, and sold by defendant as soon as received, and the amount credited on Houser's debt to him; all of which was received by said LeGrand, in entire good faith, on his own debt, and with no intention on his part to defeat or destroy plaintiff's lien, if such she had; and LeGrand not knowing actually whether she had any lien, or whether she had been paid. The evidence showed, also, that LeGrand received from Houser about twenty other bales, not grown on said place, making forty-six bales in all; but this amount lacked three or four hundred dollars of paying the debt which said Houser owed him. It was shown, also, that plaintiff did not take out any attachment, but never in any way consented to Houser's removal of any part of the crop, unless such consent is to be inferred from the fact that he removed the cotton from the plantation, and brought it to town, as fast as it was ginned and baled, and that she made no effort to prevent its being so removed; that, relying upon Houser's repeated promises to pay the debt, she waited until early in November, just before the second installment became due, when she ascertained, by going on the place, that all the crop had been removed, except about one bale, which was claimed by the laborers on the place; that she at once called upon Houser, who informed her that he had delivered the cotton grown on her place to defendant, but that he would bring other cotton, from a place in Autauga, to pay her rent; that he failing to do this, in December she made a demand, as landlord, on the defendant, for the cotton received by him, and claimed that he should give it up, or pay the rent, as she claimed a lien on it by virtue of the rent due her. Defendant admitted his receipt of the cotton, but claimed it as due on his mortgage; and



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he had sold it, and applied the proceeds to the payment of the amount due him on the mortgage, before plaintiff made any demand on him, or gave him any notice that she claimed a lien on it. Defendant refused either to pay the rent, or to deliver the cotton to plaintiff, or to pay her the proceeds; but he did not, at the time of the interview, deny any knowledge of the renting, saying nothing about it. Defendant also denied, on oath, as a witness, any actual knowledge or notice of plaintiff's lien.

"The foregoing was, in substance, the whole testimony. Upon this evidence, the court charged the jury, in express terms, that while the defendant would be liable in this action, if he received the cotton with notice of the plaintiff's lien, yet the recitals in the mortgage taken by him from Houser was not sufficient notice, and was not such notice as would put him on inquiry, to ascertain if there was rent due, and whether it had been paid; nor did the law imply such notice to him, from such a fact as that stated by LeGrand, that he was on the plantation once during the year, and knew that the plantation was the property of the said plaintiff.

"The court further charged the jury, that to give the defendant notice, and put him on inquiry, he must have some other and further knowledge of the renting, and of the terms of the contract of renting, than was given by knowledge that the plantation belonged to the plaintiff, and that Houser held as her tenant, and the recitals in his mortgage, which stated that Houser was cultivating that year the lands of the plaintiff.

"The court charged the jury, also, that the mere fact that the defendant knew Houser had rented the plantation from the plaintiff, for the year 1872, and was holding and cultivating it as her tenant, was not sufficient evidence to put the defendant on inquiry; but that, in order to hold him responsible, it must be proved that he knew there was a *lien* on the cotton for the unpaid rent, and that it was the plaintiff's duty to prove that he knew there was a lien for rent on the cotton, at the time he bought it.

"The plaintiff excepted to each of these charges, and requested the court to give the following charges, which were in writing: 1. 'If the jury believe that LeGrand had knowledge of the fact that Houser was the tenant of Mrs. Lomax, and that the cotton received from Houser was grown on the plantation of Mrs. Lomax, then he received the cotton subject to the payment of the rent due to Mrs. Lomax; if there was any due at the time he received the cotton, the plaintiff is entitled to recover the amount so due, with interest, if the



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cotton so received and sold by LeGrand was of value sufficient to pay the rent due.' 2. 'That if LeGrand, at the time he received the cotton, knew that the plantation on which it was grown belonged to Mrs. Lomax, and that Houser had rented it for the year, then the law charged him with knowledge that Mrs. Lomax had a lien upon said crop; and to protect himself, he was put upon inquiry, as to whether the rent was due, and when and how much; and he is chargeable with every fact and circumstance he could have ascertained by making such inquiry.' The court refused to give either of these charges, and the plaintiff excepted to the refusal of each."

The charges given by the court, and the refusal of the charges asked, are now assigned as error.

The case was decided at the December term, 1876, but has never been reported, the original opinion having been lost; and it is now published from a copy of the opinion found in the court below.

THOS. H. WATTS, with J. T. HOLTZCLAW, for appellant.—Le Grand knew that Houser was the tenant of Mrs. Lomax, and that the cotton was grown on the lands rented from her. This was sufficient to put him on inquiry, and to charge him with implied notice of her lien.—*Pritchett v. Munroe*, 22 Ala. 502; *Saltmarsh v. Bower & Co.*, 22 Ala. 221; *Jones v. Webster*, 48 Ala. 109; 2 Vesey, 437; 14 Vesey, 426; 16 Vesey, 248; 1 John Ch. 267; 4 Ohio, 458; 15 Peters, 112. That the action lies against a purchaser who has notice of the lien, see *Hussey v. Peebles*, 53 Ala. 432.

HERBERT & MURPHEY, *contra*.—Case is an equitable action, and the plaintiff can not recover when he was himself in fault—when the loss or injury complained of was caused by his own negligence, or might have been prevented by the exercise of proper care and diligence by him.—1 Bacon's Abr. 109, tit. *Action on the Case, C*; Ventr. 310; 2 Stark. Ev. 212; 2 Greenl. Ev. § 232 a; *Jones v. Allen*, 1 Head, Tenn. 635. Under this rule, if the complaint had set out all the facts which the evidence established, the plaintiff could not have recovered. She had a lien for rent, superior to the defendant's claim under his mortgage; and she charges that this lien was lost to her and destroyed by the act of the defendant. But the proof shows that her lien was lost by her own negligence, and her failure to use ordinary diligence to save her debt; that the crops raised by the tenant were more than enough to pay her debt and the defendant's debt; that the greater part was openly removed and sold by the tenant,

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during the plaintiff's absence, and the defendant did not secure enough to pay his own debt. To allow her now to recover of the defendant, and thus make him bear the consequences of her negligence, would be inequitable. The case is similar, in principle, to judgment liens, as in the cases of *Patton v. Hayter, Johnson & Co.*, 15 Ala. 18; *Turner v. Lawrence*, 11 Ala. 430; *Waring v. Durdan*, 11 Ala. 988. On the equity of the case, see *White & Tudor's Lead. Cases in Eq.*, vol. 2, p. 131; 14 Ohio, 428. Nor could the defendant be charged with implied notice, under the facts proved. When the plaintiff allowed her tenant to remove the crops, and sell them in open market, her conduct could only be reconciled with good faith on the hypothesis that her rent was paid. "Even where circumstances are brought directly home to the purchaser, which would have been sufficient, in themselves, to put him on inquiry, and thus amount to notice; he will be entitled to rebut the presumption of notice, which would otherwise arise, by showing the existence of other and attendant circumstances, of a nature to allay his suspicions, and lead him to suppose that inquiry was not necessary."—2 *Lead. Cases in Equity*, Hare & W.'s Notes, 114; *Moore v. Clementson*, 2 Camp. 22.

BRICKELL, C. J.—1. The statute declares a lien on crops grown on rented premises, for the rent of the current year. Process of attachment is given, as the remedy for the enforcement of the lien, if the crop is removed, or about being removed from the premises, without the consent of the landlord. If removed, the attachment may be levied on it in the possession of the tenant, or one holding it in his right, or in the possession of a purchaser with notice of the lien.—Rev. Code, §§ 2961–63. Rent, at common law, was a lien—a charge on the goods of the tenant, remaining on the demised premises. The landlord could distrain, however, only on the premises; and if the goods were removed by the tenant before distress, the lien, or right to charge them, was lost. So, the right to distrain was lost, if not exercised before the expiration of the term. There are acts of parliament, modifying these rules of the common law, enlarging the remedy by distress, and authorizing the landlord to pursue and seize the goods after the removal; which, with changes and alterations, to adapt them to their condition, have been re-enacted in several States of the Union. A material distinction between them and our statutes is, that the removal from the premises, or the expiration of the term, does not impair the lien of the landlord—that the lien is preserved, until the crop

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passes into the possession of a purchaser without notice.—*Governor v. Davis*, 20 Ala. 366.

2. A purchaser can not claim protection against the lien, if he has notice of facts, which, if he had pursued, would have enabled him to ascertain its existence. The rule prevails, which is applied when protection is claimed against a prior right or equity—that whatever is sufficient to put a party upon inquiry, is sufficient to charge him with notice. If the want of notice—of actual knowledge, or information—result from the failure to use proper diligence to ascertain whether the fact or right exists, protection against it can not be claimed.—*Chapman v. Glassell*, 13 Ala. 55; *Herbert v. Hancock*, 16 Ala. 597; *McGehee v. Gindrat*, 20 Ala. 100.

3. The mortgage to the appellees conveys, among other things, “the entire crop of cotton and corn, which may be made during the present year, on the plantation in Montgomery county, known as Mrs. C. Lomax’s plantation, which I” (the mortgagor) “am cultivating the present year.” If the appellees were claiming a right, legal or equitable, in the premises, acquired from the mortgagor, as paramount to that of Mrs. Lomax in and to the lands, it would scarcely be denied that they are charged and affected with notice of her right and her estate. The recital of the mortgage is, that the plantation is hers, and that the mortgagor is cultivating it the present year. It is equivalent to a declaration that the fee, the ultimate reversion, resides in her, and the right of the mortgagor is to cultivate during the year. This is the nature, character, and extent of the right there asserted; and it would not have been thus limited, if it had been greater. This recital, in our judgment, is full notice to the appellees, of the lien which the law attaches to the relation existing between the mortgagor and Mrs. Lomax. It is notice of the relation; and being notice of that, it is equally notice of the lien which the law attached to it. It is not material that the landlord has not a right of property in or to the crops. The statute simply creates a charge—a right to the satisfaction of the rent, superior to the right of the tenant, and all persons claiming under him, so long as the crop remained on the premises. If removed by the consent of the landlord, the consent is a waiver of the lien. But, if removed without his consent, the lien continues, and he is entitled to pursue and seize the crop by attachment, to enforce the lien, until the right of a purchaser without notice intervenes. Consequently, the landlord can maintain no action which involves, or is dependent on, a right of property, or a right of possession. If the crop is removed by, or, after removal, passes to the possession of, a stranger having notice of the lien, who



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sells or converts it, thereby rendering unavailing the statutory remedy by attachment for its enforcement, the landlord may maintain an action on the case against him.—*Hussey v. Peebles*, 53 Ala. 432.

4. The lien is an incident to the relation of landlord and tenant. It is not matter of contract—it is the creation of the law. It may be waived, or relinquished, by the stipulations of the lease, or of the contract of renting. But, in the absence of express, or inconsistent stipulations, in the contract, it springs out of the relation; and whoever is chargeable with notice of the relation, is chargeable with notice of the lien. The notice the statute contemplates, which deprives the purchaser of protection against the lien, is knowledge or information of the right of the landlord, or of facts which ought to have directed his attention to the lien. That the appellees did not know the terms of the contract of renting, or the amount of the rent which was chargeable on the cotton, is not material. If they desired the information, they had full means of acquiring it, and these means they were bound to use; and if they failed to do so, they are not entitled to protection against the lien.

5. The statute contemplates that, as long as the crops remain on the rented premises, they shall be subject to the lien; as at common law, the lien attached to goods upon the demised premises, and was not affected by any alienation of the tenant, until their removal. It was only after removal, that a right could be acquired, which would override or defeat the right of the landlord.—*Taylor's Law of Landlord and Tenant*, § 577. The crops being on the rented premises, is notice to all the world of the relation; and all who deal with the tenant must inquire as to the existence of the lien. After removal, the possession of the tenant, severed and distinct from his possession of the premises, is *prima facie* evidence of ownership, of the right to sell, or otherwise dispose of them. Then notice becomes necessary to charge a purchaser from him. But, in the present case, whatever right the appellees acquired, was acquired by the mortgage executed before the crops were grown—while they were in an immature state, not severed from the freehold. The delivery of the cotton subsequently was merely in subordination to the title conveyed by the mortgage, and in performance of the duty imposed by it. The appellees are not purchasers, whom a want of notice will under the statute protect. To stand in that relation, their title should have been acquired after the tenant had removed the cotton from the premises, without notice of the lien of the landlord.

The rulings of the City Court were not in accordance with  
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these views; and its judgment is reversed, and the cause remanded.

## Hamilton's Adm'r v. Blackwell.

*Bill in Equity by Creditor, to set aside Fraudulent Conveyance.*

1. *Burden of proof, as to consideration of deed.*—Where a creditor files a bill to set aside, as fraudulent, a deed executed by his debtor, which recites the payment of a valuable consideration, the burden of proof is on the grantee, if the creditor's debt ante-dates the execution of the deed, to prove the payment of the purchase-money; or, if the deed was accepted in payment of an existing debt, to prove the existence and validity of such debt.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. R. S. WATKINS.

The bill in this case was filed on the 22d June, 1871, by Alexander Hamilton, against William H. Blackwell and Lucy S. Blackwell; and sought to set aside, as fraudulent in law, a deed by which said William H. Blackwell conveyed an undivided one-third interest in a tract of land, containing three hundred and twenty acres, to said Lucy S. Blackwell, who was his sister, and to subject said interest in the land to the payment of a debt which William H. Blackwell owed to the complainant. The complainant's debt was evidenced by a promissory note under seal, for \$2,500, a copy of which was made an exhibit to the bill, and which was dated the 18th September, 1862, and payable in gold, or its equivalent, on the 1st January, 1864, to said Alexander Hamilton or order, with interest from date; and it was signed also by George Wilkinson and J. H. Jones, as co-makers with said Blackwell. The complainant brought suit on this note in October, 1865, and recovered judgment in May, 1871, against said Wilkinson and William H. Blackwell; and the bill alleged that neither of them had property sufficient to satisfy the judgment. The said tract of land had belonged to said William H. Blackwell and his two sisters, Lucy S. Blackwell, and Mrs. J. J. Wiggs, as tenants in common, each owning an undivided one-third interest; and the deed by which William H. conveyed his interest to his sister, Lucy S. Blackwell, was dated the 1st October, 1866, and recited, as its consideration, the present payment of \$1500. The bill alleged that this deed was executed by said William H. Blackwell, "with the intent to hinder, delay, and defraud your orator in

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| 60 | 300 |
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| 74 | 283 |
| 80 | 520 |
| 82 | 252 |
| 84 | 339 |
| 88 | 552 |
| 89 | 362 |
| 60 | 545 |
| 93 | 99  |

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the collection of his said debt." Answers under oath being required, the defendants filed separate answers, under oath, and each denied the charge of fraud. In reference to the consideration of the deed, William H. Blackwell answered: "On the 1st October, 1866, and long prior to that time, he was indebted to his sister, Lucy S. Blackwell, in more than \$1,500, for money loaned, and for cotton and other things of value; and in consideration of his indebtedness to her as aforesaid, to the extent of \$1,500, he sold and conveyed to her his interest in the said lands. He further states, that said sale and conveyance was a *bona fide* transaction in all respects, and in no way tainted with fraud; that the sale of said land was fair, and for a valuable and adequate consideration," &c. Lucy S. Blackwell answered: "Before and on the 1st October, 1866, W. H. Blackwell was indebted to this respondent in a large amount of money, expended and paid for him, at divers times, at his request, and for stock sold him, such as horses, &c.; also, for cotton sold and delivered, amounting in the aggregate, with interest thereon, to more than \$2,500; and in consideration of said indebtedness, to the extent of \$1,500, he sold and conveyed to this respondent his interest in said tract of land, which was one-third part thereof; and she insists that she had the right thus to collect her debt," &c.

On final hearing, on pleadings and proof, the chancellor held that the complainant had failed to establish the charge of fraud; and he therefore dismissed the bill. The appeal is sued out by the personal representative of the complainant, and the chancellor's decree is now assigned as error.

CABANISS & WARD, with D. P. LEWIS, for appellant.

R. O. PICKETT, *contra*.

STONE, J.—The record in this case shows that the debt, on which Alexander Hamilton recovered judgment against Wm. H. Blackwell, was contracted in 1862. The deed, under which Lucy Blackwell claims, was executed in October, 1866. No money was paid in the purchase; but the alleged consideration of the deed was a debt, past due, from Wm. H. to Lucy Blackwell, said to be much larger than the recited consideration of the deed—fifteen hundred dollars. On the clearly established fact, that the debt to complainant was older than the deed to Miss Blackwell, the burden was on her to show by proof that the debt from her brother to her, to the extent of fifteen hundred dollars, really existed; and,



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this being the turning point in the present case, it becomes necessary to consider, to some extent, the testimony.

The defendant's proof consists of her own and Wiggs' depositions. Her own testimony, considered by itself, is far from satisfactory. Many of the items composing her claim, if not all of them, are vaguely stated, and chiefly from hearsay. She evidently misunderstood the nature and purpose of the first charge in her account—"one-third of amount paid, \$1500—\$500." If this item means any thing in the account, it is an averment that she had paid, for the three owners, \$1500—probably in the purchase of the land; of which her brother owed her one-third, \$500. When asked to explain this item, she, in her deposition, answers, "The fifteen hundred dollars claimed as due me, was paid for my brother's interest in the land in controversy." This is all the testimony offered in support of this charge; and if true, it shows that William H. was entitled to a credit of \$1500 therefor, instead of being debited with \$500, as he was. She swears she paid for her brother, to Peebles & Bro., \$450, and through her brother-in-law, Wiggs, to Smith & Roberts, \$157. Wiggs proves payments to these parties by Miss Blackwell, but fails utterly to prove they were made on account of Wm. H. Blackwell. And the witnesses Peebles and Smith testify that Miss Blackwell made payments to them on her own account; and the former exhibits her account, showing such payment by her, of \$441. They have no recollection or memorandum of payments made by her on her brother's account; and their testimony tends strongly to show she never made such payments. Her testimony, of cotton and stock sold, in which she had an interest, is also vague, and entirely unsatisfactory. If her claim be just, she could have fortified it in many particulars. Her brother could have explained the items which she leaves in such great doubt; and no excuse is offered why his testimony was not taken.

On the other hand, it is shown, by all the proof, that Wm. H. Blackwell continued in the undisturbed possession of the land, as he had done before, up to the time when this bill was filed, more than four years after the deed was made to his sister; and the witnesses Pickett and High testify, that Miss Blackwell, just before the commencement of this suit, admitted her brother's ownership and right to control one-third of the land. We think there is a failure to prove a valuable consideration for the deed from William H. to Lucy Blackwell, and that the complainant in the court below is entitled to relief.—2 Brick. Dig. 23, §§ 122, 123, 124, 125; *Crawford v. Kirksey*, at the last term.

The decree of the chancellor is reversed, and a decree here

[Sheffey v. Davis.]

rendered granting the relief prayed by the bill. It is referred to the register to report to the Chancery Court the amount due complainant, with interest to the coming in of the report. All other questions are reserved for decision by the chancellor.

Reversed and rendered.

BRICKELL, C. J., not sitting, having been of counsel.

## Sheffey v. Davis.

*Motion to quash Execution, and set aside Sheriff's Sale.*

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| 59 | 559 |
| 78 | 130 |
| 83 | 185 |

1. *Presumptions in favor of judgment; what will not be indulged.*—When a motion is entered on the docket to quash an execution, and to set aside a sale of lands under it, on certain specified grounds, and the motion is granted by the court; this court will not, in order to sustain the judgment, presume that the action of the court was justified by other facts not specified in the motion, although the bill of exceptions does not purport to set out all the evidence that was introduced.

2. *Bankruptcy; effect on execution lien.*—The lien of an execution creditor, whose judgment was rendered before the defendant obtained a discharge in bankruptcy, though no execution was then in the hands of the sheriff, is not destroyed by the bankruptcy, and may be enforced by an *alias*.

3. *Claim of exemption; when not good cause for setting aside execution levy and sale.*—A levy and sale of lands under execution will not be set aside, at the instance of the defendant and his wife, under a claim of homestead exemption, when the value of the property at the time of the levy and sale is not shown, and it is not shown that the claim was interposed before the sale.

4. *Prior sale under execution.*—A prior sale of the lands under execution, at which the wife of the defendant became the purchaser, furnishes no ground for setting aside a subsequent levy and sale, on the motion of him and wife.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This was a motion by Zebulon P. Davis and his wife, Mrs. Williametta Davis, to quash four executions, with their levies, and to set aside and vacate a sale under them of a certain house and lot in Huntsville. The executions were issued on two judgments, which Mrs. Elizabeth W. Sheffey, as the executrix of the will of her deceased husband, L. B. Sheffey, recovered against said Z. B. Davis, in the Circuit Court of Madison, on the 28th April, 1871; one for \$249.50, and the other for \$1,425.40. An execution on each of these judgments was issued on the 1st June, 1871, and each was returned "No property found." Another execution was then issued, which was returned with the same indorsement, on

[Sheffey v. Davis.]

the 19th October, 1871; and an execution against the plaintiff, for the costs, was issued in December, 1873, and returned satisfied. On the 13th September, 1875, another execution was issued on each of said judgments, and each was levied on said house and lot; but both were returned without a sale, for want of time. Executions were again issued on said judgments, on the 26th January, 1876, and levied on said house and lot; and the property was sold under this levy, on the first Monday in April, 1876, Mrs. Sheffey becoming the purchaser, and receiving a deed from the sheriff. The motion to quash these executions and levies, and to vacate and set aside the sheriff's sale, was entered on the docket on the 18th November, 1876; and specified the following grounds: "1. Because said Zebulon P. Davis, on the 1st day of March, 1872, filed his petition in the United States District Court at Huntsville," asking to be discharged as a bankrupt, and obtained his discharge, by the decree of said court, on the 7th June, 1872; "said executions issuing after said proceedings in bankruptcy had begun, and after said discharge had been granted, were void; and said levies, being made after said proceedings in bankruptcy, were void; and said sale, under said executions and levies, was also illegal and void. 2. Because said real estate consists of a house and lot, of a value not exceeding \$2,000, which is the homestead of said Z. P. Davis and Williametta Davis, who are residents and citizens of Alabama, and who intermarried in the year 1840. Said Z. P. Davis purchased said house and lot in the year 1859; and he and his said wife have resided in said house and lot ever since, and now live in the same; wherefore said house and lot is exempt from sale under execution, and said levies and sale are void."

On the hearing of the motion, as the bill of exceptions shows, said Davis and wife introduced their own affidavits, which were substantially the same, and in which they stated that they were married in 1840; that Davis bought the house and lot in 1859, and resided in it continuously from that time thenceforward; that a judgment was rendered against said Davis on the 7th November, 1861, in favor of Thomas S. McCalley & Co., on which several executions were regularly issued, and finally a *pluries* on the 21st July, 1869, which was levied on the said house and lot; that at the sheriff's sale under this levy, on the 6th September, 1869, George L. Davis was the highest and best bidder, and, by his direction, on the payment of the price bid by him, the sheriff executed a conveyance to Mrs. Williametta Davis; that they continued to reside in the house, Mrs. Davis claiming it as her separate property, and her husband recognizing and ad-



[Sheffey v. Davis.]

mitting her title; that, if the sheriff's deed to Mrs. Davis "should be found defective, irregular, or void," then it was the homestead and property of her husband, and was exempt from levy and sale; and that "said property is not, in the opinion of this affiant, worth more than \$2,000." The bill of exceptions states, "that the statement of facts averred in said motion was admitted, except as to the value of the house and lot not exceeding \$2,000; and the counsel for the defendant in the motion stated that, at the proper time, he would sustain said denial as to value by proof." The sheriff's deeds, one to Mrs. Davis, and the other to Mrs. Sheffey, were also offered in evidence, with the several executions referred to. "It was admitted that the only claim to said house and lot set up by said Davis and wife, or either of them, at the time of the said sale by Robert E. Murphy as sheriff, at which Mrs. Sheffey became the purchaser, and prior thereto, was that of Mrs. Davis claiming it as her separate statutory estate under said former deed by Doyle as sheriff; and that no proof of claim of homestead had been made or set up, until the filing and entry of the motion in this case. But the possession and occupancy of the premises by said Davis and wife, as the residence of themselves and their family, was proved; and that at the time of said sale by Murphy as sheriff, Mrs. Davis claimed said house and lot as her property, under said former deed from Doyle as sheriff; but no homestead exemption or right was claimed or asserted by either her or said Z. P. Davis, until the filing of the motion in this case. It was further admitted, that there is now pending in this court an action of ejectment by Mrs. Sheffey, against said Davis and wife, for said house and lot; and that the debt, which is the foundation of said judgments, was contracted prior to the 1st August, 1866, for medical services rendered by said L. B. Sheffey, deceased, to the family of said Davis and wife, before, during, and since the late war."

"Upon the hearing of said motion, without the intervention of a jury, the presiding judge made the following order: 'Motion granted, and plaintiff excepts.'" The appeal is sued out by Mrs. Sheffey, and the judgment on the motion is assigned as error.

HUMES & GORDON, for appellant.

WALKER & SHELBY, PAUL L. JONES, and NICH. DAVIS, *contra*.

STONE, J.—Motion was made in this case to quash executions, and the returns thereon, and to set aside a sale of land thereunder, on certain specified grounds. The court

[Sheffey v. Davis.]

sustained the entire motion, and the purchaser at the sale, plaintiff below, excepted. It is contended here that, inasmuch as the record fails to affirm that it contains all the evidence, we must presume the existence of a sufficient cause to justify the action of the court, even if the grounds stated in the motion be held insufficient. We can not assent to this. A motion is not, strictly, pleading; and, although a demurrer may sometimes be interposed to such motion when in writing, yet, in motions such as this, pleading is not necessary. We feel it our duty to presume, in the absence of some record averment to the contrary, that the action of the court was had on the motion copied in the record. Such action is, at most, but a response of the court to a motion made by counsel; and it would be a high-handed measure for a court to make an order unsettling titles to property, or destroying the evidence of title, without any motion therefor, and without stating any facts, or giving any reason for such decision. We will consider the judgment of the court as based on one or more of the grounds stated in the motion.

2. When Z. P. Davis became a voluntary bankrupt, Mrs. Sheffey, as executrix, had an execution lien on his property in Madison county. His bankruptcy did not destroy that lien, or prevent the issue of an *alias* execution for its enforcement.—*Crow v. Reid*, at December term, 1876.

3. The claim of exemption furnished no reason for setting aside the levy or sale, for several reasons. First, it failed to show the value of the property at the time of Mrs. Sheffey's levy and sale.—*Watts v. Burnett*, at December term, 1876. Second, it failed to show that the claim was interposed before the sale was made.—*Steele v. Moody*, and *Rottenbury v. Pipes*, at December term, 1875. Third, the judgment having been rendered in 1871, it should have been shown whether the debt was contracted before or after the constitution of 1868 was declared operative, so as to show under what law the claim accrued.—*Taylor v. Anthony*, and *Miller v. Marx*, at December term, 1876.

4. If Mrs. Davis, by her older purchase, acquired a good and valid title to the property, it will enable her to defend successfully the action of ejectment brought for its recovery. It furnishes no ground for setting aside the levy and sale afterwards made.—*Nuckols v. Mahone*, 15 Ala. 212; *Cawthorne v. Knight*, 11 Ala. 268.

None of the grounds stated in the motion justified the ruling of the Circuit Court; and its judgment is reversed, and a judgment here rendered, overruling the motion made in the court below.

BRICKELL, C. J., not sitting, having been of counsel.

[McMullen et al. v. Neal's Adm'r.]

**McMullen et al. v. Neal's Adm'r.***Bill in Equity by Creditor, to enforce and foreclose Mortgage given by Principal Debtor to Surety.*

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| 70 | 396 |

1. *Subrogation of creditor to rights of surety under mortgage given by principal debtor.*—When a debtor executes a mortgage, or deed of trust, for the declared purpose of securing his accommodation indorsers; authorizing the trustee to sell the lands, if he “should make default in paying said debt at maturity, and with the proceeds pay said bill of exchange,” &c.; the deed enures to the benefit of the creditor, although it was executed without his knowledge: his acceptance of its provisions will be presumed, and he may enforce it against a purchaser with notice.

2. *Same; entering satisfaction of mortgage; when purchaser is chargeable with notice.*—When a mortgage, or deed of trust, is executed by a debtor with the declared purpose of securing his sureties, but in terms which make it enure to the benefit of his creditor, and it is duly recorded; the sureties can not, while the debt remains unpaid, impair the rights of the creditor, by entering satisfaction, or directing the trustee to enter satisfaction, on the record of the deed; and a purchaser from the debtor, after such entry of satisfaction, is chargeable with notice of the creditor's rights under the deed.

**APPEAL from the Chancery Court of Madison.****Heard before the Hon. HENRY C. SPEAKE.**

The original bill in this case was filed on the 3d August, 1870, by the personal representative of George W. Neal, deceased, against John H. McMullen and wife, Joseph C. Bradley, and William H. Wortham; and said Wortham having died pending the suit, it was revived against his administrator and heirs. The object of the bill was to enforce and foreclose a deed of trust, hereinafter described, and to subject the lands conveyed by it to the payment and satisfaction of the debt described in it. The deed, a copy of which was made an exhibit to the bill, was in these words:

“Whereas Joseph C. Bradley, Ferdinand L. Hammond, and George W. Carmichael, of Madison county, Alabama, have this day indorsed a bill of exchange, as an accommodation to me, for the sum of \$2,288.10, dated this day, due at twelve months, drawn by me in favor of said Joseph C. Bradley, on Bradley, Wilson & Co., New Orleans, Louisiana: Now, for the purpose of securing the said Bradley, Hammond, and Carmichael, I, the said John H. McMullen, have, and by these presents do convey, sell, and transfer all my right, title, and interest in and to the west half of the south half of section eight (8), township three (3), range two (2) east, lying in Madison county, Alabama, unto D. C. Hum-



[McMullen et al. v. Neal's Adm'r.]

phreys, trustee, in trust that I am to remain in possession of the same the present year, and, should I make default in paying said bill at maturity, then the trustee may proceed, after giving thirty days' notice, to sell to the highest bidder for cash the land before described, and with the proceeds pay said bill of exchange, with all costs, damages, &c. Witness my hand and seal, this 30th day of January, 1860."

This deed was signed by said John H. McMullen and his wife, and by said D. C. Humphreys; was regularly acknowledged by all of said parties, and was recorded in the office of the probate judge of said county on the 6th February, 1860. The said bill of exchange was negotiated by said George W. Neal, and was his property; and not being paid at maturity, the debt was extended for twelve months, and another bill of exchange executed by the same parties, and in the same form, for \$2,723.87. This latter bill was unpaid when the bill was filed, and was made an exhibit to the bill. The bill alleged, also, "that on the 24th January, 1863, notwithstanding said bill of exchange remained unpaid, said Bradley, Hammond and Carmichael instructed said Humphreys, as trustee, to enter satisfaction of the said deed, as appears by an entry on the margin of the registration of said deed; and said Humphreys, on the 11th May, 1863, pursuant to said order, did release and discharge the said property from the lien created by said deed. And complainant shows that said entry of satisfaction was not made by the order, consent, or knowledge of his intestate; nor did he ever receive payment or satisfaction of said bill of exchange; and said entry was not authorized by him, but, on the contrary, he earnestly objected and protested against the same, as soon as the same came to his knowledge." The bill alleged, also, that McMullen "thereafter" sold and conveyed the said lands to the defendant Wortham; that Wortham bought with knowledge, "direct and constructive," that the lands were subject under the deed of trust to the payment of said debt, and should in equity be held a trustee of the lands for the benefit of the complainant. The prayer of the bill was, that an account might be taken of the complainant's debt, and also of the rents and profits of the land; that a trust in favor of the complainant might be declared against Wortham, and the lands be sold for the payment of the amount ascertained to be due; and the general prayer was added, for other and further relief.

Decrees *pro confesso* were taken against all the defendants except Wortham, who filed an answer, admitting the execution of the deed of trust as alleged, but denying that said George W. Neal had any rights under it, or any knowledge

[McMullen et al. v. Neal's Adm'r.]

of its execution at the time it was given; averring that he negotiated the bill of exchange solely on the personal responsibility of the parties to it, and without any reference to the deed of trust; admitting that he purchased the lands from McMullen on the 31st January, 1863, and paid in cash \$3,236, which was their full value; alleging that said purchase was made "after the record entry of the direction to the trustee to enter satisfaction of said deed, and without notice, either actual or constructive, that complainant's intestate either had, or pretended to have, any claim or right to said land, by lien, subrogation, or otherwise;" and alleging, also, that said George W. Neal, up to his death, in October, 1869, having knowledge of the entry of satisfaction of said deed, never objected to it, nor complained of it, and never asserted any right or claim under the deed of trust, although the drawer and indorsers of the bill had for many years been insolvent.

The direction of Bradley, Hammond, and Carmichael, to Humphreys, to enter satisfaction of the deed, which was made an exhibit to Wortham's answer, was as follows: "The undersigned, Joseph C. Bradley, Ferdinand L. Hammond, and George W. Carmichael, beneficiaries in a deed of trust made by John H. McMullen and wife to David C. Humphreys as trustee, and conveying to him a tract of land lying and being in Madison county, Alabama, described as," &c., "to secure us as indorsers of a bill of exchange drawn by said John H. McMullen on Bradley, Wilson & Co., New Orleans, La., for the sum of \$2,238.10, dated Huntsville, Ala., 16th January, 1860, payable to the order of Joseph C. Bradley twelve months after date thereof, do hereby authorize and direct the said David C. Humphreys, as such trustee, to enter satisfaction on the record of said deed, which is recorded in the office of the judge of probate of Madison county, Alabama. Witness our hands, this 24th January, 1863." And the entry of satisfaction by the trustee was as follows: "Pursuant to the above order, I hereby release and discharge the property mentioned in this deed, from the lien created thereby, May 11, 1863;" to which his name was subscribed.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and his decree is now assigned as error.

L. P. WALKER, for appellants, cited *Houston v. Branch Bank*, 25 Ala. 259; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Pond v. Scott*, 44 Ala. 241.



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D. P. LEWIS, with CABANISS & WARD, *contra*, cited Burge on Sureties, 324; 1 Story's Equity, § 638; *Moore v. Harrison*, 1 Eq. Cas. Abr. 93; *Wright v. Morley*, 11 Vesey, 12-21; *Moses v. Murgatroyd*, 1 John. Ch. 119; *Phillips v. Thompson*, 2 John Ch. 418; *Toulmin v. Hamilton*, 7 Ala. 362; *Troy v. Smith & Shields*, 33 Ala. 469; *Constant v. Mattison*, 22 Ill. 546; *Clark v. Ely*, 2 Sandf. Ch. 166; *Ten Eyck v. Holmes*, 3 Sandf. Ch. 428; *Briggs v. Davis*, 20 N. Y. 15.

STONE, J.—The trust deed given by McMullen to Humphreys, trustee, is more than an indemnity to Bradley, Hammond, and Carmichael, his accommodation indorsers. It is a security for the payment of the debt. The language of the deed is, "should I make default in paying said bill at maturity, then the trustee may proceed, after giving thirty days' notice, to sell to the highest bidder, for cash, the land before described, and with the proceeds pay said bill of exchange, with all costs, damages," &c. This deed is a direct security to the holder of the bill of exchange; and when the bill matured, and was dishonored, he was not bound to wait until the indorsers were damnified, by forced collection of the money, by suit, or otherwise. He had the right then to demand that the trustee should execute the trust for his benefit; and if the trustee had refused, or failed to do so, he could, in equity, at once have coerced a sale of the property, for the payment of his claim. This right springs out of the very language of the trust deed; and if Neal had no agency in procuring the execution of the deed, and even knew nothing of its existence, this does not, in the least, impair or qualify his rights. The security existed, whether he knew it or not; and being for his benefit, the law presumes his acceptance of its provisions.—See *Branch Bank of Mobile v. Robertson*, 19 Ala. 798; *Huckabee v. Billingslea*, 16 Ala. 414; *Ohio Life Ins. &c. Co. v. Reeder*, 18 Ohio, 35; *Osborn v. Noble*, 46 Miss. 449; *Homer v. Savings Bank*, 7 Conn. 478; *Roberts v. Colvin*, 3 Gratt. 358; *Daniel v. Joyner*, 3 Ired. Eq. 513; *Eastman v. Foster*, 8 Mete. 19; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Constant v. Matteson*, 22 Ill. 546; *Cullum v. Br. Bank*, 23 Ala. 797.

On the general doctrine of subrogation, see *Furnold v. Bank of Mo.*, 44 Mo. 336; *Toulmin v. Hamilton*, 7 Ala. 362; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Troy v. Smith & Shields*, 33 Ala. 469; *Phillips v. Thompson*, 2 Johns. Ch. 418; 1 Story's Eq. Jur. §§ 499, *et seq.* and notes; *Clark v. Ely*, 2 Sandf. Ch. 166; *Wright v. Morley*, 11 Vesey, 12; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Wiggins v. Dow*, 3 Sumn. 410; 2 Brick. Dig. 384, §§ 141 to 153; *Leary v. Cheshire*, 3 Jones'



[McMullen et al. v. Neal's Adm'r.]

Eq. 170; *McCune v. Belt*, 45 Mo. 174; *Aldrich v. Hapgood*, 30 Verm. 617; *Miller v. Sawyer*, 3 Verm. 412.

The first bill of exchange, to secure the payment of which the deed of trust in the present record was executed, matured in December, 1860. The renewed bill matured, and was dishonored, 24-27 December, 1861. On 31st January, 1863, more than a year afterwards, McMullen sold and conveyed the mortgaged lands to Wortham, and received the purchase-money from him. There is no proof that Wortham, when he purchased and paid, had received actual notice of the trust deed, or of Neal's rights thereunder. The bill of exchange was never in fact paid. On the 24th January, 1863, Bradley, Hammond, and Carmichael, styling themselves beneficiaries under said trust deed, gave directions to Humphreys, the trustee, "to enter satisfaction on the record of said deed, which is recorded in the office of the judge of probate of Madison county." Humphreys entered satisfaction on the record, May 11, 1863, pursuant to said order. The record is silent, whether the direction to enter satisfaction was attached to, or spread on the record, before Humphreys actually entered the satisfaction—May 11th, 1863. The circumstances tend to show, that it was not. But we consider that immaterial. The registration was constructive notice of the existence of the deed, to all persons trading for the land; and it was equally constructive notice of Neal's interest thereunder. If Wortham saw, or had knowledge of the direction given by Bradley, Hammond, and Carmichael, to enter satisfaction, he was equally notified that Neal did not unite in such direction. This was enough to put him on inquiry, as to Neal's interests. These could not be certified away, by Bradley, Hammond, and Carmichael.

We need not, and do not, decide whether a mere direction to enter satisfaction, even by all the beneficiaries, without such actual entry, would be enough. Possibly, such direction would be treated as a mere power, subject to revocation, until acted on and executed.—See Code of Ala., §§ 2222-3. Nor do we decide whether or not an unauthorized entry of satisfaction by the trustee, Humphreys, would have authorized Wortham to purchase afterwards, and thus place himself on the high vantage-ground of a *bona fide* purchaser without notice. That question is not before us, as Wortham purchased long before Humphreys made the entry of satisfaction.—See *Thrall v. Spencer*, 16 Conn. 139; *Jones v. Quin-nipiac Bank*, 29 Conn. 25; *Himes v. Keller*, 3 W. & Serg. 401; *Houston v. Br. Bank at Huntsville*, 25 Ala. 250.

We are unable to regard Mr. Wortham as a *bona fide* purchaser.

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chaser without notice; and the result is the decree of the chancellor is affirmed.

BRICKELL, C. J., not sitting, having been of counsel.

## Benagh, adm'r v. Turrentine, adm'r.

### *Final Settlement of Accounts of Deceased Administrator.*

1. *Widow's quarantine, and duty and liability as administratrix.*—When the widow becomes administratrix of the estate of her deceased husband, it is her duty as administratrix to institute proceedings, within a reasonable time, to have her dower allotted to her; and if she fails to do so, she can not claim the rents and profits of the plantation as her statutory quarantine (Code of 1876, §§ 2238-9), but is chargeable as for a *devastavit*.

2. *Same.*—What is a reasonable time, within which she should institute such proceedings, depends somewhat on the known condition of the estate: when the estate is known to be insolvent, or where the widow has dissented from the will, no delay should be allowed; in other cases, ordinarily, eighteen months should be allowed for the presentation of claims, and ascertaining the condition of the estate.

3. *Same; taxes.*—When the widow, or her estate, is charged on settlement of her accounts as administratrix, on account of her failure to have her dower assigned, as for a *devastavit*, she is only chargeable with two-thirds of the value of the rent of the plantation from the time when she should have had her dower assigned, since the other third would belong to her as dower; and she should be credited with two-thirds of the taxes paid on the land from and during the same time.

4. *Allotment of dower; jurisdiction of Probate Court.*—The Probate Court has no jurisdiction to allot dower to the widow in lands in which her husband, though in possession, had only an undivided half-interest at the time of his death.

5. *Repairs to dwelling-house and lands.*—On settlement of the accounts of the widow, as administratrix of the estate of her deceased husband, she is entitled to a credit for the value of repairs on the dwelling-house and plantation, which were necessary to their habitation and cultivation; but, being held entitled to the use and occupation of the premises for two years free of rent, as her statutory quarantine, she should be charged with her reasonable proportion of the cost of such repairs; and these questions should be settled on the settlement of her administration by the Probate Court.

6. *Board and maintenance of infant distributees.*—When such settlement is had with the administrator *de bonis non* of the husband's estate, the widow can not be allowed a credit for the board and maintenance of the infant distributees; though that question might be settled on the final distribution of the estate, after the claims of creditors had been satisfied.

7. *Computation of interest.*—On the settlement of an administrator's accounts, he should be allowed interest on disbursements, unless he then had in his hands money belonging to the estate; but, if he then had money in his hands, on which he was chargeable with interest, the disbursements should be first applied to the extinguishment of the accrued interest, and the balance deducted from the money on hand.

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APPEAL from the Probate Court of Limestone.

In the matter of the estate of Thomas H. Hobbs, deceased,

[Benagh, adm'r, v. Turrentine, adm'r.]

on final settlement of the accounts and vouchers of Mrs. Anne B. Hobbs, his deceased widow and administratrix, by James Benagh, her administrator; the accounts and vouchers, as filed for settlement, being contested by John Turrentine, as administrator *de bonis non* of said Thomas H. Hobbs. The decedent, Thomas H. Hobbs, was a resident citizen of said county at the time of his death, which occurred on the 22d July, 1862; and he died intestate, leaving his widow, Mrs. Anne B. Hobbs, and two infant children, as his heirs-at-law and the distributees of his estate. He was also seized and possessed of a valuable estate, consisting of lands, slaves, and other personal property. The lands consisted of three separate but contiguous tracts, which he held under the will of Thomas Maclin, deceased, by whom they were devised to him in fee, but subject to a life-estate in his mother, Mrs. Rebecca Hobbs, to the extent of an undivided half interest; and he resided on and cultivated the entire tract, as one plantation, up to the time of his death. After his death, the lands were seized by officers of the United States, as confiscated property, and were held and occupied by them until the 1st January, 1866, when possession was delivered to his widow, who had procured a special pardon from the president of the United States, for her complicity in the rebellion. On the 31st January, 1866, letters of administration on the estate of her deceased husband were granted to the widow; and she died on the 19th August, 1872, having never made any settlement of her administration. During all this time, she resided in the dwelling-house, with her two children, renting out a portion of the lands, and cultivating a portion with hired labor. On the 11th July, 1868, a petition was filed in her name by James Benagh, as her attorney in fact, asking an allotment of her dower in the lands; but the petition was dismissed, on her motion, on the day set for the hearing, and no assignment of her dower was ever made; nor was any guardian ever appointed for the children. Mrs. Rebecca Hobbs, the mother of said Thomas H., was living at the time of the settlement, in March, 1876.

The above being the material facts shown by the record, the administrator of Thomas H. Hobbs moved the court to charge the widow, as administratrix, with the value of one-half of the annual rent of the lands, "from and including the year 1866, to the year 1872 inclusive, with interest from the end of each year;" which motion the court sustained. The administrator of the widow then amended his account, by leave of the court, by claiming a credit for repairs and improvements made on the house and lands, amounting to \$603.70; also, for \$6,046, as amount expended by the widow



[Benagh, adm'r, v. Turrentine, adm'r.]

for the support and maintenance of the children; and the further sum of \$1,163.03, on account of taxes paid on the lands from 1866 to 1872, both inclusive. The court allowed a credit for one-third of the taxes paid on the lands, but refused to allow any credit for either of the other items; and to these rulings of the court exceptions were reserved by the widow's administrator. On the statement of the account by the court, a balance was ascertained against the widow for \$5,202.27, for which a decree was rendered against her administrator. The rulings of the court above stated, and numerous other rulings, principally on questions of evidence, to which exceptions were reserved, but which require no special notice, are now assigned as error, together with the final decree.

McCLELLAN & McCLELLAN, with whom was JAMES BENAGH, for appellant.

LUKE PRYOR, *contra*.

STONE, J.—Dower has always been a favored right in English jurisprudence. Before the Conquest, it, and its complement, quarantine, were recognized as fundamental principles in British civilization. Coke classes it in the trio of rights which the law favors: life, liberty, and dower. So rooted had the sentiment become, that in *Magna Charta* it was provided, that the widow "may remain in her husband's house forty days after his death, within which time her dower shall be assigned." And Canute, the Danish usurper, is said to have proclaimed the edict, "*Ubi maritus habitavit, absque lite, et absque controversia, habitent uxor et infans ubique, absque lite.*" And so our statutes, which secure quarantine and dower to the widow, and a succession to the homestead, if a decedent leave a surviving wife or infant child, are conceived in the same humane spirit.

In 1826 it was enacted, that the widow shall "retain the full possession of the dwelling-house in which her husband most usually dwelt next before his death, together with the outhouses, offices, or improvements, and plantation thereunto belonging, free from molestation and rent, until she shall have her dower assigned her."—Clay's Dig. 173, § 7. In the same statute it was declared to be "lawful for any widow, claiming dower, to file her petition in the Circuit or County Court, in the county where the husband shall have usually dwelt next before his death, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments, of which she claims dower, and

[Benagh, adm'r, v. Turrentine, adm'r.]

praying that dower may be allotted to her; whereupon the said court shall issue their writ," &c.—*Ib.* § 5.

Under this statute, the widow alone is named, as having authority to file the petition. It was declared by this court, "The object of the statute was to protect the widow in the enjoyment of the homestead, and the rents and profits accruing therefrom, until her dower was assigned, and to make it incumbent on those entitled to the fee, whether they be the heirs-at-law or purchasers, if they desired to obtain possession of the portion to which they were entitled in the real estate, to become themselves the actors to have the widow's dower assigned her. If they remain inactive, and acquiesce in her possession, she is not subject to the payment of rent, nor to molestation. Until her dower is assigned, she holds the premises for an indefinite period, and may rent them out and appropriate the proceeds to her own use."—*Shelton v. Carroll*, 16 Ala. 148; *Inge v. Murphy*, 14 Ala. 289; *McLaughlin v. Godwin*, 23 Ala. 846; *Oakley v. Oakley*, 30 Ala. 131; *McAllister v. McAllister*, 37 Ala. 484; *Smith v. Smith*, 13 Ala. 329; *Doe, ex dem. v. Webb*, 18 Ala. 810; *Boynton v. Sawyer*, 35 Ala. 497; *Slatter v. Meek*, *Ib.* 528; *Perrine v. Perrine*, *Ib.* 644; *Walters v. Williams*, 38 Ala. 680.

These statutes have been very materially changed since that time, in this: "the widow, heir," and "personal representative of the husband," are all mentioned in the statute, as having authority to file the petition.—Code of 1876, §§ 2238-9. The personal representative is charged with a trust, to collect together the assets of the estate, preserve them, and apply them, after defraying the expenses of administration, first to the payment of debts, and next to the claims of legatees and distributees. If there be a deficiency of personal assets to pay the debts, he must institute proceedings to subject the real estate to the payment of such debts as may remain unpaid, after exhausting the personal estate. In this last function, he is said to represent the creditors, and to become the antagonist of the heirs.—*Bond v. Smith*, 2 Ala. 660; *Steele v. Humes*, at present term. As to the duty and authority of the personal representative, see *Stewart v. Stewart*, 31 Ala. 207; 1 Brick. Dig. 957, §§ 609, 610, 611.

If any person, other than the widow, was the personal representative of an estate, and neglected, for the space of six and a half years, to have the widow's dower allotted to her, thus leaving her in the entire possession and control of the "dwelling-house where her husband most usually resided next before his death, with the offices and buildings appurtenant thereto, and the plantation connected therewith," and



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all the income and profits thereof; and if a sale of the realty should become necessary for the payment of debts, we would not hesitate to declare that such personal representative thereby committed a *devastavit*, and rendered himself liable to account for the loss he had entailed on the estate. The fact that the widow becomes administratrix can not vary the rule. As widow, she may be under no obligation to move in the matter. She represents herself. But, when she takes upon herself the administration of the estate, her duties, and consequent liabilities, are enlarged. She becomes trustee for others, and, while caring for her own interests, she must not neglect the interests of those for whom she holds in trust. We decide that it was the duty of Mrs. Hobbs, within a reasonable time after she was appointed administratrix, to take steps to have her own dower allotted; and that failing, she is liable as administratrix for the injury the estate suffered by reason of her failure.

What is a reasonable time, within which proceedings should be instituted for the assignment of dower, must depend somewhat on the known condition of the estate. No unbending or arbitrary rule can be declared. If the estate is known to be insolvent, so as to render it necessary to sell the lands for the payment of debts; or, if there be a will, and the widow dissents, and claims dower, then no reason or excuse exists for delay in proceeding to have it assigned. On the other hand, the statute allows eighteen months for the presentation of claims. The condition of the estate may not be known until that time. In such case, it would not seem unreasonable, or be sufficient proof of mal-administration, if no proceedings were instituted until after the expiration of that time. Allowing reasonable time for instituting proceedings, and conducting them to a decree, another six months should probably be allowed, before the imputation of waste, or neglect, could rightly be indulged. Hence, we think the Probate Court erred in charging Mrs. Hobbs rent for the first two years—1866 and 1867. The court also erred in charging her full rent for the remaining two years. Her dower, if allotted, would have given her one-third of those rents; and consequently, the loss to the estate, by her failure to have dower assigned, is only two-thirds of the value of the rents of the undivided half, commencing with the year 1868. She should have no credit for the taxes paid for the years 1866 and 1867, and credit for only two-thirds of the taxes for the remaining years.

No importance attaches to the fact that a petition was filed for her in the Probate Court, praying for dower, and afterwards voluntarily dismissed. Mr. Hobbs' tenancy of



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the land was only an undivided half interest at that time, and the Probate Court had no jurisdiction to allot dower.—Code of 1876, §§ 2239, 2248; 1 Brick. Dig. 617, § 71; 1 Scrib. on Dower, 74. The Chancery Court alone could have decreed dower in this case.

We think the Probate Court erred, also, in ruling that he had not jurisdiction to consider of the question of repairs, to render the dwelling habitable, and the plantation cultivable.—*Henderson v. Simmons*, 33 Ala. 291. In allowing for repairs, however, the whole expenditure must not be allowed. The first two years of the enjoyment, the administratrix had the sole use; and for the remaining years, she had one-third of the use. This outlay should be apportioned between the parties, so as to make each pay in proportion to the benefit conferred. It is probable that one-half, or three-fifths, should fall on the estate of Mr. Hobbs, to be taken out of the rents, and the residue be rejected, as properly an expense resting on Mrs. Hobbs. This can be better adjusted on proof before the Probate Court.

The claim for board and maintenance of the infant heirs can not come up in this proceeding. The Probate Court has no power or right to consider it, on a settlement of Mrs. Hobbs' administration with the administrator *de bonis non*. If this was a proceeding for distribution, in which decrees could be rendered in favor of distributees, then possibly these equities could be considered. But the present claim is by the administrator *de bonis non*; and, for aught that can appear in this proceeding, all the assets may be needed for the payment of debts. It is scarcely necessary to say, that the claims of creditors are paramount to those of distributees. If the assets are more than sufficient to pay debts, and if there is a surplus for distribution, the Probate Court, in this settlement, has no jurisdiction to inquire of advances made by Mrs. Hobbs to or for her children, or to adjust any equities between them. If there is a remedy, it is in another forum.

In making final settlement, the administratrix is entitled to credit for her disbursements as of the time they were made. That is, if, when she made disbursements, interest had accrued against her, then such disbursement must be applied first to the extinguishment of the accrued interest, and any balance should be deducted from the principal of assets received. If, when she made disbursements, she had received, or was liable to account for no money assets then in her hands, she should, in like manner, be allowed interest on advances thus made.

Reversed and remanded.

[*Lesslie v. Richardson et al.*]**Lesslie v. Richardson et al.***Bill in Equity by Purchaser, to recover Money paid at Sale under Chancery Decree.*

1. *Sale of lands under judgment or decree afterwards reversed.*—A sale of lands, under a judgment or decree which is afterwards reversed on error, is not thereby avoided, unless the judgment or decree is void; and an averment, in a bill asking relief against a purchase at such sale, that the decree was “reversed and annulled” by this court on appeal, is not equivalent to an averment that it was void.

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2. *Money paid under mistake; remedy at law and in equity.*—A bill in equity does not lie to recover money paid under a mistake, either of fact or of law: if paid under a mistake of fact, an action at law is the appropriate and only remedy; and if under a mistake of law, it can not be recovered at all, either at law or in equity.

3. *Sufficiency of demurrer; dismissal for want of equity.*—When a bill is wanting in equity, it may be dismissed by the court on that account, even though no demurrer be interposed, or be defective in the specification of causes; and if dismissed on demurrer, though the demurrer be defective, this court will not reverse, unless the record shows that the complainant offered to remedy the defects of the bill by amendment.

APPEAL from the Chancery Court of Limestone.

Heard before the HON. R. S. WATKINS.

The bill in this case was filed on the 3d April, 1873, by Mrs. Nannie T. Lesslie, suing by her husband as her next friend, against the heirs and administrator of William Richardson, deceased, and the sureties on the official bond of said administrator, and against the personal representative and heirs of Thomas Bass, deceased; and sought relief on account of the purchase of a tract of land by complainant, under the following state of facts: On the 7th October, 1861, William Richardson obtained a judgment against Thomas Bass and others, in the Circuit Court of said county; and the judgment being unsatisfied, on the 1st July, 1867, said Richardson and Bass both having died, the administrator of Richardson filed a bill in chancery against the administrator of Bass, seeking to subject certain lands to the satisfaction of said judgment. Under a decree in favor of the complainant in that suit, the lands were sold by the register on the 7th December, 1868, the complainant in this suit becoming the purchaser, at the price of \$505.40. The sale was reported to the court, and confirmed by it, and a deed was executed to Mrs. Lesslie as the purchaser under its decree; and she alleged in her bill in this case that the purchase-money paid by her was distributed by Richardson's administrator among

[*Lesslie v. Richardson et al.*]

the persons entitled to share in his estate. Some time afterwards, but before the expiration of two years, an appeal from the chancellor's decree was sued out by the administrator of Bass, and the decree "was reversed and annulled" by this court, on the 9th July, 1870; but the case has never been reported, and no copy of the opinion is set out in the record. After the reversal of this decree, John Turrentine, as the administrator of the estate of Thomas Bass, obtained an order from the Probate Court for the sale of said lands; and at his sale, under the order of said court, Mrs. Lesslie again became the purchaser, at the price of \$505.40; which sum she paid to said administrator, and, the sale being confirmed, he executed to her a conveyance of the lands.

The bill alleged that the complainant, at the time of her purchase at the first sale, under the chancery decree, "had no notice or knowledge of any of the facts set forth in the said proceedings in chancery, and was induced to purchase the same by the representations of the heirs of said Richardson, that his administrator had a decree, and a right to sell the same, and could and would make a good title thereto;" that, after the reversal of said chancery decree, "said Turrentine stated and represented to her that she obtained no title to said land under her first purchase, and that she would lose valuable improvements which she had erected thereon, and that said land still belonged to the estate of Thomas Bass, and that he, as administrator of said Bass, had the right and authority to sell the land; and that she, said complainant, being ignorant of the facts connected with the proceedings to sell said lands, both in the Chancery and in the Probate Court, and knowing that said Turrentine was familiar with the facts in both cases, and having great confidence in him, was thereby, and in consideration of the premises, induced to buy said land a second time as above stated." The bill alleged, also, that Richardson's said judgment was not a just debt or charge against the estate of Bass, because said estate was duly declared insolvent on the 22d July, 1867, and said judgment was not filed as a claim against it within nine months after the declaration of insolvency. The prayer of the bill was as follows: "Your oratrix prays that, on final hearing, the heirs of the estate of said William Richardson, deceased, above mentioned, and the administrator thereof, be required to refund and restore said sum of \$505.40 to your oratrix, with the interest thereon; and that said lands above described, belonging to the estate of said Richardson, be held liable therefor. But, if your oratrix be mistaken in this remedy, then she further prays that said John Turrentine be decreed to pay back to your oratrix the said sum received by



[*Lesslie v. Richardson et al.*]

him, herein shown; and she further prays for all such other and further relief as the facts of the case demand."

The heirs and administrator of Richardson filed a joint demurrer to the bill, but without specifying any causes or grounds of demurrer; and said Turrentine, as administrator of Bass, also filed a demurrer—1st, for want of equity; 2d, for misjoinder of parties; 3d, because the complainant has a plain and adequate remedy at law; and, 4th, for multifariousness. On the hearing on the demurrers, the complainant offered to amend her bill, by striking out the names of Richardson's administrator and his sureties as parties, and the averments in reference to the insolvency of Richardson's estate, and the failure to file the judgment as a claim against it. The chancellor sustained the demurrers, not stating on what ground, and dismissed the bill, but without prejudice; and he refused to allow the proposed amendment, holding that it would not remedy the defects of the bill. The refusal to allow the amendment, and the dismissal of the bill, are now assigned as error.

R. A. McCLELLAN, for appellant.—The demurrer for want of equity merits no consideration, since the statute requires a specification of the causes of demurrer.—Rev. Code, § 3350. Only two special grounds of demurrer are assigned—multifariousness, or misjoinder of parties, and adequate remedy at law. The form of the bill is an answer to the first objection, being filed in a double aspect.—38 Ala. 329; 11 Ala. 325; 7 Porter, 144. If she was entitled to relief in either aspect, her bill should have been retained, and the other part struck out by amendment. She had no remedy at law against Richardson's estate, because the money paid to his administrator was not assets in his hands.—20 Ala. 354; 19 Ala. 25; 11 Ala. 264; 8 Ala. 80. Nor could she maintain an action against him individually, after he had paid over the money without notice or previous demand.—12 Ala. 778; 5 Ala. 292. If she could sue Richardson's heirs, she could only recover the particular sum which could be traced into the hands of each, and must bring a dozen or more suits; and a court of equity will intervene to prevent such multiplicity of suits. 3 Stew. 383; 7 Ala. 585. If she has a remedy against Turrentine, by action at law, this does not take away the original jurisdiction of equity in cases of mistake; and the whole doctrine of implied trusts, as applied in equity, is founded on the idea that one person will not be allowed to retain money or property which, in equity and good conscience, belongs to another.—2 Story's Equity, §§ 1251-56; Hill on Trustees, 173 4, and authorities cited in notes. That com-

[*Lesslie v. Richardson et al.*]

plainant may recover the money paid under the facts stated in the bill, whether it be called a mistake of fact or of law, see *Gwynn v. Hamilton's Adm'r*, 29 Ala. 233; 8 Wheaton, 174, 217; 1 Peters, 1-16; 1 Story, 122-38; 32 Geo. 181; 20 Cal. 637; 33 Mo. 377; 2 Conn. 617; 21 Geo. 118; 1 Beasley, N. J. 165; 1 Head, Tenn. 77.

L. P. WALKER, and LUKE PRYOR, *contra*.—The complainant can not recover from Richardson's administrator, because he paid out the money in due course of administration, without notice of the mistake.—5 Ala. 292; 12 Ala. 292. Since there can be no recovery against him, he was an improper party, and the bill was multifarious. It is multifarious, also, because the claims or liabilities of Richardson and Turrentine have no connection whatever; in fact, they are inconsistent and antagonistic, and if one is liable, the other is not.—*Colburn v. Broughton*, 9 Ala. 351; *Waller v. Taylor*, 42 Ala. 297. *Hardin v. Swope*, 47 Ala. 273. But no recovery can be had against either, since the doctrine of *caveat emptor* applies to judicial sales.—*Worthington v. McRoberts*, 9 Ala. 297; *O'Neal v. Wilson*, 21 Ala. 288. Nor can money be recovered, either at law or in equity, when paid through ignorance or mistake of law.—*Beene v. Collenberger*, 38 Ala. 647; *Town Council of Cahaba v. Burnett*, 34 Ala. 400; *Dill v. Shaham*, 25 Ala. 694.

STONE, J.—William Richardson recovered a money judgment against Thomas Bass and others. Each of the parties died, leaving the judgment unsatisfied. Richardson, the administrator of Richardson, filed a bill against Turrentine, administrator, and the heirs-at-law of Bass, to subject lands descended to the payment of said judgment. A decree was rendered, in accordance with the prayer of the bill, and under it certain lots in the town of Athens were sold, and purchased and paid for by Mrs. Lesslie, and title and possession given to her. Richardson's administrator then settled his administration, and distributed the money he had received from the sale of said lots, and was discharged as administrator. Subsequently, the decree, under which the lots were sold, was reversed in this court, on the appeal of the legal representative and heirs of Bass, and the bill finally disposed of against Richardson. Thereupon, Turrentine, who had previously obtained an order in the Probate Court to sell said lots, did sell them, and Mrs. Lesslie again became the purchaser, paying about the same sum at each sale, and received a conveyance from the administrator, Turrentine. The present bill was filed against the distributees of Richardson, his personal representative, and the sureties of the



[*Lesslie v. Richardson et al.*]

latter, and against Turrentine, the administrator of Bass. It sets forth the facts stated above; avers that there is real estate, which was of the estate of Richardson, deceased, and which is now in the hands of one of the Richardson heirs as purchaser; and prays that said real estate be declared subject, and that "the heirs of the estate of William Richardson deceased, and the administrator thereof, be required by decree to refund and restore the said sum of five hundred and five dollars and forty cents to your oratrix. . . . But, if your oratrix be mistaken in this remedy, then she further prays that the said John Turrentine be decreed to pay back to your oratrix the said sum received by him herein shown."

There was a demurrer filed to the bill, which the chancellor sustained. Among the causes of demurrer assigned is that of multifariousness, which consists of misjoinder of causes of action and of parties. Pending the argument on demurrer, the complainant moved for leave to amend her bill, by striking out the names of William Richardson's administrator and his sureties, and claiming no relief against them in that capacity. This would have left the heirs and distributees of Richardson, and the administrator of Bass, the only defendants to the bill. The chancellor refused to allow the amendment, holding that it would not heal the defects of the bill.

The present bill charges, that the decree in favor of Richardson, administrator, against Turrentine, administrator, and others, under which the lots were sold in December, 1868, was "reversed and annulled" in this court, in June, 1870. This is not equivalent to an averment that the decree was void, for defect of jurisdiction, or for other cause. A sale, made under a judgment or decree that is afterwards reversed for error, is not thereby avoided, unless the judgment or decree under which it is made is void.—1 Brick. Dig. 773, § 1971; Rorer on Judicial Sales, §§ 63 to 68, 138, 139, 483; Freeman on Judgments, §§ 117, 118; Freeman on Executions, § 345. There is not enough in the present bill to justify a recovery against Richardson's heirs or distributees. The bill does not show on what ground the decree was reversed and annulled; and although we think the decree was probably reversible on appeal, it was not void.

2. Nor are we prepared to say a remedy could be had against Turrentine.—See *Beene v. Collenberger*, 38 Ala. 647; *Town Council v. Burnett*, 34 Ala. 400. The claim against Turrentine, even if it fell without the influence of the doctrine of money paid under a mistake of law, is, at most, only an effort to recover back money paid by mistake; an action



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for money had and received. An action of assumpsit is the appropriate remedy in such case. When there is a complete and adequate remedy at law, the Chancery Court has no jurisdiction, unless it is conferred by statute. There is no statute which confers on that court jurisdiction of a simple money demand like this.—1 Brick. Dig. 639, § 3.

3. It is here contended, that the grounds of demurrer assigned in this record do not sufficiently specify the defects in the bill, noticed above, and that, on that account, the demurrer should have been disregarded.—Code of 1876, §§ 3005, 3784. There is another principle, however, which renders this inquiry immaterial. The bill contains no equity, and it is not error to dismiss such bill, even though there be no demurrer. To put the court in error, the complainant must have offered to amend her bill, so as to give it equity. This the record fails to show she did.

The chancellor's decree is affirmed.

BRICKELL, C. J., not sitting, having been of counsel.

## Acklen's Executor v. Hickman.

### *Action on Common Counts.*

1. *Partial payment, as preventing bar of statute of limitations.*—A partial payment on a debt, before the statute of limitations has effected a bar, is a recognition of the debt, and fixes a new date from which the statute begins to run; but an indorsement of such partial payment, in the handwriting of the creditor, is not evidence of such payment.

2. *Charge as to sufficiency of evidence.*—In a civil cause, a mere preponderance of evidence is not sufficient to authorize a verdict for the plaintiff, unless it is sufficient to satisfy the minds of the jury; but a charge asked, asserting "that a preponderance of evidence merely, inclining the minds of the jury to sustain the plaintiff's claim, can not be regarded as sufficient," is calculated to mislead the jury, and is properly refused.

3. *Alien enemy.*—To bring a case within the rule as to alien enemies, the two parties to the contract must be, at the time, under the dominion of different and opposing flags.

FROM the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by James Hickman, against John D. Weeden, as the executor of the last will and testament of William Acklen, deceased; and was commenced on the 4th April, 1874. The complaint contained a count on an account stated between the plaintiff and the defendant's testa-

[Acklen's Executor v. Hickman.]

tor, on the 21st March, 1864; a count for money paid by plaintiff, for defendant's testator, on the 21st March, 1864, amounting to \$291.09; and a count on an account stated between them on the 10th November, 1869. The defendant pleaded—1st, *non assumpsit*; 2d, payment; 3d, the statute of limitations of three years, with an averment that the claim sued on was an open account; 4th, the statute of limitations of six years; and, 5th, accord and satisfaction. The plaintiff took issue on the first, second, and fifth pleas; replied to the third, that on the 10th November, 1869, on a statement of accounts between plaintiff and said Acklen, the balance sued for was ascertained to be due to plaintiff, and Acklen promised to pay it; and to the fifth, that on said statement of accounts, a balance being ascertained in favor of the plaintiff, Acklen promised to pay it, and made a partial payment of \$20 on the 10th November, 1869.

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence an account made out in his favor against said William Acklen, which was without date except the year 1864, and which contained the following items: "Paid hauling 24 B. C. to Beirne's, \$182.70;" "Baling, rope, and twine, for 24 B. C., \$108.39;" the two items together amounting to \$291.09. On said account was an indorsement in these words: "Huntsville, November 10th, 1869, twenty dollars on the within account;" to which the plaintiff's name was signed. The defendant objected to the reading of this indorsement to the jury, and the court sustained the objection. "The plaintiff then introduced as a witness James V. A. Hinds, who testified as follows: In the year 1864, witness was the book keeper and agent of the plaintiff, and as such agent, in February, 1864, he contracted with William Acklen, defendant's testator, in said county of Madison, for the purchase of all his crop of cotton, supposed to be about forty bales, on the following terms and conditions: to pay twenty cents per pound, and one-half the rise, and to furnish the baling, rope, and twine for baling, and to haul said cotton to town without charge. Pursuant to said contract, witness, as agent of plaintiff, furnished baling, rope, and twine, sufficient to bale said forty bales; and he received from said Acklen sixteen bales, and no more, and paid said Acklen for the same soon after the delivery thereof. The gin on Acklen's premises became broken, or out of order, so that witness had the remainder of the cotton hauled to the gin on the plantation of George P. Beirne, where it was ginned and baled, and was sold by said Acklen to other parties, and witness received no more of it. The account sued on is for the bagging, rope, and twine for the twenty-four bales of cotton

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which Acklen thus failed to deliver, and for the hauling above stated. The account is in the handwriting of witness, and was taken by him from plaintiff's books, and is correct. Some time in April, 1864, witness, as agent of said Hickman, presented said account to Acklen, who admitted that he owed the account, but did not state what amount, or when due. The witness further stated, that thereafter—some four or five years, he thinks—plaintiff came to Huntsville from Nashville, which was his home, and brought said account with him; that he, at the request of said plaintiff, went with him to Acklen's residence; that said account was the subject of conversation between them, and Acklen admitted it to be just; and that, while there, he saw Acklen pay plaintiff a bank bill, but does not know what amount it was. The plaintiff then asked said witness to look at the indorsed credit, and say in whose handwriting it was; and he answered, that it was in the handwriting of plaintiff. Plaintiff then asked him, whether he saw said Hickman make said indorsement, and when; to which he answered: "After we left Acklen's house, we came up to town, to the square; and it was there, and on the same day, but the day of the month or year he does not recollect, he saw Hickman make the indorsement; and that Acklen was not present." The indorsement was thereupon read to the jury, against the defendant's objection, and he excepted. The witness testified, that it was on the same day he saw some money paid by said Acklen to Hickman, but he don't know how much, and cannot state the day, or the month, or the year, when it was done, or on what account the money was paid, except from what Hickman told him. The defendant objected to the evidence of what Hickman told the witness in the absence of Acklen; which objection was sustained by the court. To this evidence the defendant objected, but his objection was overruled; to which he excepted. This was all the evidence."

"The defendant asked the court to charge the jury, in writing, that if the plaintiff relied on the payment indorsed on the account, so as to stop the operation of the statute of limitations, such payment must be proved to have been made at the time it bears date. The court refused this charge, and instructed the jury, of its own motion, that it was not necessary for the credit to have been indorsed on the account, or to be in writing, in order to remove the bar of the statute of limitations; that it was sufficient, if they were satisfied that a payment was made on the account before the bar of the statute was complete, though the exact time was not proved; and if the payment was made within six years, the account is not barred by the statute of limitations of six years. To the



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charge given, and to the refusal of the charge asked, the defendant excepted.

"The defendant asked the court, in writing, to charge the jury, that a preponderance of evidence merely, inclining the minds of the jury to sustain the plaintiff's claim, can not be regarded as sufficient. The court refused this charge, and the defendant excepted to its refusal.

"The defendant also asked the court, in writing, to charge the jury, that if they believed Hickman, the plaintiff, bought the cotton at the time and place specified by the witness Hinds, namely, in February, 1864, in Madison county, Alabama, the sale was illegal; and if they believe that the account sued on was a part of said contract of sale, then the same was illegal, and will not support this action, and they must find for the defendant. The court refused this charge, and the defendant excepted to its refusal."

The rulings of the court on the evidence, the charge given, and the refusal of the charges asked, are now assigned as error.

JOHN W. WEEDEN, and WALKER & SHELBY, for appellant.

HUMES & GORDON, and BRANDON & JONES, *contra*.

STONE, J.—The Circuit Court erred in admitting in evidence the indorsement of credit on the account. It was not shown that such indorsement was true, either as to the amount of money paid, or the time of payment. A partial payment made on a debt is treated as a recognition of its correctness, to the extent then claimed; and if made before the bar of the statute is complete, it wipes out all previously accrued time, and such payment fixes a new date from which the statute begins to run. A mere indorsement, however, made by the holder of the paper, without proof of payment actually made, and at a time before the bar is complete, is not evidence of payment.—See *Knight v. Clements*, 45 Ala. 89.

2. Evidence, in a civil cause, must be sufficient to satisfy the minds of the jury. Preponderance, unless it produce that result, is not enough. The charge asked, however, was rightly refused, because it was calculated to mislead. 1 Brick. Dig. 871-2, §§ 964-5.

3. There is no question of alien enemy between Acklen and Hickman, so far as we are informed by this record. To bring a case within that rule, the parties contracting must be, at the time, under the dominion of different and opposing flags.

Reversed and remanded.

[Blunt v. Strong et al.]

## Blunt v. Strong et al.

*Bill in Equity by Purchasers at Bankrupt Sale, for Correction of Mistake in Deed, as Cloud on Title to Lands.*

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1. *Leading questions to witness.*—To determine when a question is leading, and therefore not allowable in any particular case, no rule of universal application can be laid down, but each case must, to some extent, be determined by its peculiar facts and circumstances. All the authorities agree, that direct and leading questions may be propounded, when necessary to lead the mind and attention of the witness up to the particular subject upon which he is called to testify; but, when the witness is interested, or *prima facie* biased in favor of the party by whom he is called, any question is objectionable, as leading, which suggests to him the desired answer, or, embodying a material fact, admits of an answer by a simple negative or affirmative.

2. *General and indefinite interrogatories.*—An interrogatory to a witness, asking if the allegations in four specified paragraphs of the bill are not true, is leading, and is also objectionable for generality; and in answer to a general concluding interrogatory, asking him to state any other matter or thing within his knowledge, that may be of benefit to either of the parties to the cause, or material to the matters in controversy, the witness can only state matters which are germane or supplementary to his former answers.

3. *Privileged communications to attorney.*—When an attorney is employed to devise and consummate a plan, by which the husband may secure lands to the wife in payment of an admitted indebtedness, and is afterwards employed by the wife to file a bill for the specific performance of the executory contract agreed on, he can not testify as a witness, at the instance of a subsequent purchaser from the husband, against the objection of the husband and wife, that a mistake was made in the description of the lands conveyed.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. WILLIAM H. ROBINSON, as special chancellor, selected by the parties, on account of the incompetency of Hon. H. C. SPEAKE.

The bill in this case was filed on the 30th March, 1874, by Laura A. Blunt and others, children of James R. Blunt, deceased, against Thomas B. Strong and his wife, Mrs. Willie E. Strong, Alfred H. Ellett, who was the father of Mrs. Strong, and several other persons; and sought equitable relief on the following state of facts, as shown by the bill and exhibits: On the 27th October, 1866, said Thomas B. Strong was seized and possessed of certain lands in said county, on which he resided, and which were situated on the north side of the Winchester road, containing three hundred and thirty acres; and he also had a reversionary interest in other lands, situated on the south side of said road, which contained about three hundred and twenty acres, and were occupied by his mother, Mrs. Mayhew, to whom they had been assigned as her dower in the estate of her deceased husband.

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At the same time, he was indebted to his wife in the sum of about \$3,700, for moneys belonging to her statutory separate estate, which he had received and used; and desiring to secure this indebtedness, by the advice of counsel, he executed and signed an instrument under seal, on said 27th October, 1866, by which he agreed and covenanted to hold a part of said lands which were particularly described, for the sole and separate use of his wife, and to convey the same by proper deed to said A. H. Ellett, her father, in trust for her; and his wife also agreed to accept such conveyance in satisfaction of her debt, and she and her father signed the said instrument as parties. On the 15th November, 1866, Mrs. Strong filed her bill in chancery, by said A. H. Ellett as her next friend, against her husband, setting out said covenant and agreement, and asking that her husband might be compelled by the decree of the court to execute a conveyance of the lands as stipulated; and having obtained a decree in said suit, on the 4th December, 1866, her husband executed a deed, pursuant to its terms, conveying said lands, as described in said written instrument, to said Ellett, in trust for her. On the 28th May, 1868, Thomas B. Strong filed his petition in the District Court of the United States at Huntsville, asking to be discharged as a bankrupt; and he obtained his discharge on the 23d June, 1868. Milton Humes was appointed the assignee of said bankrupt; and on the 28th December, 1868, as such assignee, he sold at public auction the lands on the south side of the Winchester road, in which Mrs. Mayhew had a life-estate, and which had been added to the bankrupt's schedule by an amendment. At this sale, Douglas, Donegan & Co. became the purchasers, and received a deed from the assignee in bankruptcy; and on the 14th March, 1872, W. H. Donegan, as the surviving partner of said firm, sold the lands to Mrs. M. M. Blunt, as the administratrix of her deceased husband, in compromise and satisfaction of a debt which said partnership owed to the estate of Blunt; the transaction being authorized by the Probate Court of said county, in which the administration of Blunt's estate was pending, and afterwards ratified and approved by said court, and a conveyance executed to complainants under its decree.

A copy of the covenant or contract between Strong and his wife and Ellett was made an exhibit to the bill. The lands which, by its terms, Strong covenanted to convey to Ellett in trust for Mrs. Strong, were thus described: "*The south-west fourth of section eight; the north-east fourth of section seven, and the south-west part of the north-west fourth of section eight,*" describing the last fraction by courses and



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distances, and as "containing fifty acres, more or less; all lying and being in township three, range one, east." The same description was carried into the chancellor's decree, and the deed executed under its order. But the bill alleged that the lands were so described by the mistake of the draughtsman, or of the parties: that Strong intended and covenanted to convey to the trustee the lands lying north of the road, of which he was seized and possessed in fee, and not any part of the lands in which his mother had a life-estate, and on which she resided; that the south-west quarter of section *eight* was inserted in the deed, by mistake, instead of the south-west quarter of section *five*; that Strong did not include any land in his original schedule in bankruptcy, and explained to his assignee, as a reason for such omission, that he had conveyed all his lands to said A. H. Ellett, in trust for his wife, and did not deem his reversionary interest in the lands occupied by his mother as worth anything; that when he afterwards amended his schedule, by returning these lands, he described them as incumbered by the dower interest of his mother, with the title in fee in him on her death, and they were thus sold by the assignee in bankruptcy. The bill alleged, also, that said Strong and wife remained in the possession of the hundred and twenty acres in the south-west quarter of section *five*, claiming and using it as a part of the lands conveyed to said Ellett in trust, until the 24th September, 1869, when they discovered the mistake; "and they then fraudulently conspired to surrender said land in section *five*, claim an exemption of it, keep silent as to the mistake until proof of it should be lost, and then claim the south-west quarter of section *eight*:" that said Strong, in pursuance of this fraudulent purpose, again amended his schedule in bankruptcy, by including said land in section *five*, and stated under oath, in his application for leave to amend, that he did not know, when he filed his original schedule, that he had any title or interest in said lands, legal or equitable.

Donegan, as surviving partner, the heirs of his deceased partner, the assignee in bankruptcy of Strong, and the administratrix of Blunt's estate, were joined as defendants to the bill, with Ellett, Strong, and his wife; and the prayer of the bill was: "that the cloud on complainants' title, created by said mistake, be removed; that all right, title, and interest, legal and equitable, of said defendants, in said south-west quarter of section *eight*, and said north-west quarter of section *seventeen*, township three, range one east, of lands in Madison county, be divested out of them, and vested in complainants; and for other and further relief," &c.

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Decrees *pro confesso* were entered against all the adult defendants, except Ellett, Strong, and his wife, who filed separate answers, denying the alleged mistake in the description of the lands. The complainants took the depositions of D. P. Lewis, the attorney who wrote the covenant and contract between Strong and his wife and Ellett, and who was also the solicitor of Mrs. Strong in her chancery suit against her husband; and of Milton Humes, the assignee in bankruptcy of Strong, and of W. H. Donegan; while, on the part of the defendants, the depositions of said Ellett, Strong and wife, were taken on their own behalf. Numerous objections and exceptions were reserved by both parties, most of which require no special notice. The defendants objected to the competency of said Lewis as a witness against them, because he was their attorney and solicitor, and all his knowledge or information was derived from confidential communications; and they also objected to the second and third interrogatories propounded to the witness Donegan, and his answers thereto. These objections will be understood from the opinion of the court.

On final hearing, on pleadings and proof, the special chancellor dismissed the bill; and his decree is now assigned as error.

CABANISS & WARD, for the appellants.

L. P. WALKER, *contra*.

STONE, J.—To determine when a question is leading, and, if leading, when it will be allowed in practice, is one of the most difficult questions the practitioner encounters. So much depends on the nature of the fact sought to be proved, and on the temper and bias of the witness, that no general rule can be laid down, which will suit the requirements of every case. All the authorities agree, that direct and leading questions may be propounded to any witness, to lead his mind and attention up to any subject, upon which he is called to testify; and there are many other questions, which are of such character, that the inquiry must be framed in leading form, else the counsel and witness can not be made to understand each other. Proof of hand-writing, of character, of personal identity, and of many other analogous subjects, are of this class. And when a witness is called to testify against what appears to be his interest or bias, or manifests reluctance, hesitation, evasion, or art, in giving his testimony, the court will permit leading questions to be propounded by the party calling him, so as to elicit the full truth, if possible.



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These rules, if they may be called rules, are so much dependent on the circumstances of the particular case, that they can rarely become the subject of judicial review.

But, when the witness is interested, or *prima facie* biased in favor of the party calling him, leading questions should not generally be allowed, farther than to lead the witness up to the subject about which he is to testify. A question which suggests the answer sought, is, as a rule, leading. "Questions are also objectionable, as leading, which, embodying a material fact, admit of an answer by a simple negative or affirmative."—1 Greenl. Ev. § 434. In *Page v. Parker*, 40 N. H. 48, 63, the court said: "The question proposed by the plaintiff to Arioch Wentworth in his deposition was manifestly leading. It suggested a material fact, in such a way as to indicate very decisively to the witness that he was expected to verify its truth by his answer, and might have been answered by a simple affirmative or negative." In *Turney v. The State*, 8 Sm. & Mar. 104, 112, the same doctrine is asserted. In *Lessee of Snyder v. Snyder*, 6 Bin. 483, 490, the court said: "Instead of asking the witness, whether he had heard John Bower say anything, and what, on a certain subject, the words were put into his mouth, viz., 'did he assign to you, as a reason why he would not bid more for the isle of Cue, that he could buy Willing's land for 3l. an acre, and that on yearly installments, &c?' I am of opinion, therefore, that the plaintiffs in error have supported their exception to Miller's deposition." The deposition was ruled out.—See, also, *Sayre v. Durwood*, 35 Ala. 247; *Donnell v. Jones*, 13 Ala. 490; *James v. Tait*, 8 Porter, 476. And a question is, to all intents and purposes, leading, if it states a material fact, and asks the witness whether it is true or false. This, however, must be taken with the qualifications stated above.

Under these rules, many of the questions propounded to the witnesses, Thomas Strong, Willie Strong, and A. H. Ellett, were leading; and they, and the answers to them, should have been suppressed. We append to this opinion a statement of the particular interrogatories which fall under this ruling.\*

The entire deposition of W. H. Donegan, except the answer to the first interrogatory, should have been suppressed. The second interrogatory was leading, under the rule above

\*Interrogatories propounded to Willie E. Strong that are suppressed: Nos. 5, 6, 7, 12, 14, 18, 19, 32, 33, 34, 35, and all answers thereto.

Suppressed interrogatories and answers in deposition of Thos. B. Strong: Nos. 8, 9, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 30, 31, 32, 33.

Suppressed interrogatories and answers in deposition of Alfred H. Ellett: Nos. 4, 6, 7, 8, 17, 18, 19, 20, 21, 28, 31, 32.



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laid down, and was further objectionable, because it asked the witness to state, in one sweeping answer, whether or not the statements in four named sections of the bill are true. This objection is made manifest, when the answer of the witness is examined. His answer was, they are true. So, the answer to the general interrogatory, numbered 3, is objectionable. To such interrogatory, no answer should be allowed of matter that is not germane to the subject of some special inquiry, and, in a measure, the complement of testimony previously given. To allow otherwise, would be to permit interrogatories to become a delusion and a snare.

We think the witness, David P. Lewis, was not competent to testify to the matters shown in his deposition. He was more than a mere draughtsman, selected by the common choice of the two contracting parties, to reduce their previous agreement to writing.—See *Parish v. Gates*, 29 Ala. 254. The record tends to show, that he was the selected attorney to devise and consummate a plan by which Thomas Strong should secure to his wife payment, in land, of a debt due from the former to the latter. That this must have been his relation to the transaction, is shown by the fact that, after drawing the executory agreement looking to that result, he, as solicitor for Mrs. Strong, filed a bill to have the executory contract ratified and executed, and prosecuted it in her interest to a successful termination. This was attorneyship, and the information he received during, and in virtue of the retainer, was privileged. His deposition should have been suppressed.—1 Greenl. Ev. § 237, and sections following.

There is evidence of acts and admissions by Thomas Strong and Mr. Ellett, done and made in the absence of Mrs. Strong. These are not evidence against her.

The result of the foregoing rulings is to make it proper that much of the testimony, on which the case was tried below, should be retaken. We should probably do injustice to the parties, if we were to offer any comments on the present mutilated state of the evidence; and we abstain from doing so.

The parties are about in equal fault for the condition in which this record comes before us; and we therefore divide the costs equally between the adult parties; half against appellants, and half against appellees.

Reversed and remanded.

BRICKELL, C. J., not sitting, having been of counsel.

[Shelton's Adm'r v. Poulson's Adm'r.]

**Shelton's Adm'r v. Poulson's Adm'r.***Settlement of Insolvent Estate ; Contest between Creditors.*

1. *Filing claim against insolvent estate.*—When a claim against an insolvent estate is filed in the Probate Court, properly verified, after the report, but before the declaration of insolvency, this is a sufficient filing.

APPEAL from the Circuit Court of Jackson.

The record does not show the name of the presiding judge.

In the matter of the final settlement and distribution of the insolvent estate of Joseph Phillips, deceased, which was reported insolvent, by John Phillips, the administrator, on the 10th June, 1874, and regularly declared insolvent by the Probate Court on the 8th March, 1875; and against which claims were filed by John A. Shelton, as the administrator of the estate of William L. Shelton, deceased, and by Samuel Rorex, as the administrator of the estate of Lucy Poulson, deceased. The claim in favor of Shelton's estate, which was a decree rendered by said Probate Court on the 10th June, 1874, was properly verified by the oath of the administrator, and was indorsed by the probate judge, "Filed October 4, 1874." The administrator of Mrs. Poulson's estate filed written objections to the allowance of this claim, because, among other reasons, "the same was not properly filed and verified within nine months after the declaration of insolvency of said estate." The Probate Court overruled the objections, and allowed the claim; "being of the opinion," as the bill of exceptions recites, "and so ruling and holding, that said claim had been filed in this court, as a claim against said insolvent estate, and all the while, since the time of said filing and docketing, had remained in said court, or on file with the papers of said estate, the same having never been withdrawn after the declaration of insolvency, and that this was all the law required." On appeal to the Circuit Court, the decree of the Probate Court was assigned as error, and was reversed; and the judgment of the Circuit Court is now assigned as error in this court.

COULSON & NORWOOD, for appellant.

ROBINSON & BROWN, with THOS. H. WATTS, *contra*.

[Eakin v. Brewer.]

STONE, J.—The claim of Shelton's estate, against the estate of Phillips, was filed in the Probate Court, properly verified, after the estate of the latter had been reported insolvent; and, under the construction of the record most favorable to appellee, between that time and the final declaration by the court that the estate was insolvent. This brings the case precisely within the influence of *Levert v. Read*, decided at December term, 1875, and the filing must be adjudged sufficient.

The judgment of the Circuit Court is reversed, and the cause remanded, with directions that that court affirm the judgment of the Probate Court.

## Eakin v. Brewer.

### *Statutory Action in Nature of Ejectment.*

1. *What title will support action.*—Prior possession for several years, accompanied with the erection of valuable improvements, and other acts of ownership, raises a presumption of title, which, in the absence of proof of an outstanding title in a third person, will support an ejectment against a mere trespasser.

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APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by William S. Eakin, against T. T. Cotnam, tenant in possession, to recover a town lot in Stevenson, with damages for its detention; and was commenced on the 14th March, 1872. Leroy H. Brewer intervened as the landlord of the tenant, and defended the suit. The plaintiff derived title under a purchase at execution sale against one J. E. Wallace, and the sheriff's deed to himself, as one of the plaintiffs in execution, as the purchaser; and he introduced in evidence the judgment on which the execution was issued, and the proceedings in the suit in which the judgment was rendered. The suit was commenced by attachment, in favor of W. S. Eakin & Co., against said J. E. Wallace, which was sued out on the 11th April, 1867, and was levied by the sheriff on the lot here sued for. The attachment was sued out on the ground of the defendant's non-residence, and publication was made against him as a non-resident; and judgment by default was rendered, on the 11th April, 1869, on proof of such publication. An execution on this judgment was levied on said lot, on the 4th August,



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1869; and the lot was sold, under said levy, on the first Monday in September, 1869.

To prove title in said Wallace, the plaintiff introduced one Timberlake as a witness, who testified, "that he knew J. E. Wallace; that said Wallace went into possession of said lot, under claim of title, in 1858, and occupied said lot, and exercised acts of ownership over the same, from the time he so entered into possession, until some time in the year 1862, when the town of Stevenson was occupied by the United States troops; that said Wallace left Stevenson, during its occupation by the said troops, and went into the country with his family, but returned again, as soon as the troops left, in 1862; that in 1858, when said Wallace went into possession of said lot, there was on it a store-house, of one story, and a dwelling-house; and that said Wallace, after he went into possession, added another story to the store-house, and made some other improvements on the lot, which enhanced the value." B. L. Davis, another witness for the plaintiff, "testified that he knew said Wallace; that said Wallace went into the possession of said lot in 1858, and occupied it continuously until the year 1862, when he left it during the occupation of Stevenson by the United States troops, and moved into the country, but returned to town after it was evacuated by the said troops, in the fall of 1862, and he thought he returned to the said lot; that in 1858, when Wallace took possession of said lot, the only improvements on it were a store-house, and a dwelling-house; that Wallace built a second story to the store-house, and divided the upper story into two offices, one of which was used and occupied as a law-office by an attorney, and the other was used for a tailor's shop; that he put a flight of steps to the offices, so that they could be reached from the front street, and built a kitchen on the lot, and added a porch and dining-room to the dwelling." T. E. McMahan, another witness for the plaintiff, testified to the value of the lot, and its annual rental value, and the value of the improvements erected by the defendant; also, "that he saw J. E. Wallace, in the spring of 1863, residing on another lot in said town, with his family, which was known as the 'Austin and Coffey lot;' that the town of Stevenson was re-occupied by the United States troops, in the summer of 1863; that said Wallace went north in the later part of 1863, or in the year 1864, and while Stevenson was occupied by said troops, and had not returned as late as April 11th, 1867, when the attachment of W. S. Eakin & Co. was levied on said lot; and that the houses, with all the improvements on said lot, were destroyed by fire during the late war." "The defendant admitted that

[Eakin v. Brewer.]

he first went into the possession of said lot in the month of May, 1869."

"This being all the evidence, the court charged the jury, of its own motion—1st, that if they believed, from the testimony, that said Wallace left the lot sued for in 1863, and did not return, then his possession was not recent, and they must find for the defendant; 2d, that they must find for the defendant, if they believed the evidence; 3d, that a possession, with a claim of right, and making permanent improvements, was evidence of title at that time, but the plaintiffs in this action can not recover on this showing, if Wallace left the said lot before or during the year 1863, and has not returned. To the giving of said charges, numbered 1, 2, and 3, the plaintiff excepted;" and he here assigns them as error.

BRANDON & JONES, with JASPER I. JONES, for appellant, cited Tyler on Ejectment, 72-3; *Jackson v. Denn*, 5 Cowen, 200; *Livingston v. Walker*, 7 Cowen, 637; *Lewis v. Gouquette*, 3 Stew. & P. 184; 1 Term Rep. 334; 15 La. 76; *Clarke v. Clarke*, 51 Ala. 498; *Badger v. Lyon*, 7 Ala. 564; *McCall v. Pryor*, 17 Ala. 533; *Cox v. Davis*, 17 Ala. 714; 16 John. 314.

L. P. WALKER, *contra*.—It devolved on the plaintiff to show such title in Wallace as was subject to levy and sale under the attachment and execution; and this he failed to do. *Hendon v. White*, 52 Ala. 597-600; Tyler on Ejectment, 177-8, 530; *Jackson v. Town*, 4 Cowen, 599; *Jackson v. Jones*, 9 Cowen, 182; Adams on Ejectment, 4th ed., 352-5; 1 Rawle, 223; 18 Ala. 812; 19 Ala. 184, 629.

STONE, J.—The three affirmative charges given by the court, and excepted to, each and all assert, substantially, the same legal proposition. We think each mistook the law. The possession by Wallace from 1858-9 to 1862-3, the valuable improvements put on the lot by him, and his acts of ownership, raised the presumption of title in him at that time, which, in the absence of proof of outstanding title in another, would support or defend an action of ejectment. See *Heydenfeldt v. Mitchell*, 6 Ala. 70; *Badger v. Lyon*, 7 Ala. 564; *McCall v. Pryor*, 17 Ala. 533. *Hendon v. White*, 52 Ala. 597, was not intended to unsettle this principle. See, also, *Clarke v. Clarke*, 51 Ala. 498.

We have no evidence of any other possession of the land in controversy, until 1869, when the defendant went into possession, and has retained it ever since; but he shows no title. Plaintiff, as one of the firm of Eakin & Co., claims title



[Bernstein v. Humes et al.]

under a levy of attachment in favor of his firm in 1867, on the lot in controversy, judgment obtained in the cause in 1869, sale by the sheriff and purchase by him in 1871, and the present suit brought in 1872. Under these facts, the presumption of title in Wallace is not overcome.—*Anderson v. Melear*, at December term, 1876.

Reversed and remanded.

BRICKELL, C. J., not sitting, having been of counsel.

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### *Statutory Action in Nature of Ejectment.*

1. *General exception to charge.*—A general exception to an entire affirmative charge, consisting of several distinct propositions, can not be sustained, unless every part of the charge is erroneous.

2. *Plea of not guilty, and disclaimer.*—The plea of not guilty is an admission of possession by the defendant (Code of 1876, §§ 2962-3), and is equivalent to the consent rule at common law; and when it is pleaded, the defendant can not also enter a disclaimer.

3. *Charge referring construction of deeds to jury.*—It is the duty of the court to construe deeds, or other written instruments offered in evidence; and a charge which refers their construction to the jury is erroneous.

4. *Charge misleading jury.*—A charge which is indefinite, or has a tendency to mislead the jury, is properly refused.

5. *Statute of limitations; suspension during the war, and judicial knowledge thereof; computation of time.*—The late civil war prevailed, as this court judicially knows, from 1861 to 1865; and the statutes of limitations were suspended from the 11th January, 1861, to the 21st September, 1865. Consequently, the statute of limitations of ten years can not bar an action commenced in July, 1871, unless the adverse holding commenced fourteen years, eight months, and ten days before the writ was sued out.

6. *Sale of lands under execution against mortgagor; title of purchaser.*—When a mortgage reserves no right of possession in the mortgagor, or the law-day has passed, nothing but an equity of redemption remains in the mortgagor, and a purchaser under execution against him does not acquire such title as will sustain an ejectment; but, where the mortgage reserves to the mortgagor the possession and enjoyment of the property, with the right to use and rent it, until default shall be made in the payment of the secured bonds, extending through several years, this is a clear legal right, which is subject to levy and sale under execution against him; and a purchaser at the sale would acquire a title on which he might recover, in ejectment, against any one who does not show a paramount title.

7. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the adverse possession of a third person, under claim of ownership, though without color of title, is void as against the adverse holder, and the grantee can not recover against him in ejectment; and this principle applies to a voluntary conveyance by a purchaser at a sale under execution.

APPEAL from the Circuit Court of Madison,  
Tried before the Hon. LOUIS WYETH.

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This action was brought by Mrs. E. C. Humes and others, against Morris Bernstein; and was commenced on the 12th July, 1871. The complaint was in the form given in the Revised Code (p. 677), and the premises sued for were thus described: "The following tract, or parcel of land, situated in the city of Huntsville in said county of Madison, known and described as follows: part of lot number seventeen in the original plan of said city, fronting on Gallatin street, commencing on said street, ninety-nine feet from north-west corner of said lot number seventeen, and running thence southwardly, along said street, thirty-eight and one-half feet; thence eastwardly, and at right angles with said street, one hundred and sixteen and one-half feet; thence northwestwardly, on a line parallel with said street, thirty-eight and one-half feet; thence westwardly, at right angles with said street, to the beginning; also, another part of said lot, commencing at the north-east corner of that part above described, running northwardly, on a parallel line with Gallatin street, ninety-nine feet; thence westwardly, and at right angles with said street, two feet; thence southwardly, and on a line parallel with said street, ninety-nine feet; thence eastwardly, at right angles with said street, to the beginning." The defendant pleaded—1st, that he was not, at the commencement of the suit, in the possession of the premises sued for, or any part thereof; 2d, not guilty; 3d, a suggestion of adverse possession for more than three years, and the erection of valuable improvements; 4th, the statute of limitations of ten years; and issue seems to have been joined on all these pleas, without objection.

The premises sued for were situated in a square, or block, which was bounded on the north by Clinton street, east by Jefferson street, south by Randolph, and west by Gallatin street; and this square was subdivided, according to the original map of the city, into four lots, numbered 17, 18, 25, and 26, respectively; each lot measuring one hundred and forty-seven feet and six inches in width, and the same in length. Lot number seventeen was the north-west quarter of the square, and the defendant owned the north-west corner of it. The plaintiffs owned nearly the whole remaining part of the square, their lands adjoining the defendant's on the east and south. Of the two fractional lots sued for, the one fronting thirty-eight and one-half feet on Gallatin street was the southern part of the premises claimed by the defendant, and the narrow strip two feet in width was on the east. The main controversy was in reference to the large lot; the only question as to the other being, whether the division fence was on the proper line. The plaintiffs claimed the premises

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sued for as a part of the property which once belonged to the old "Bell Tavern," and afterwards to the "Huntsville Hotel Company;" and they deduced their title from the said company, under a deed from the United States marshal to L. P. Walker, as the purchaser at a sale under execution against the company, and a deed from said Walker to themselves, as hereinafter more particularly stated.

The plaintiffs introduced a great many deeds in evidence, commencing with a deed from Leroy Pope, who held under a patent from the United States granted in 1809, to one Henry Cannon, dated the 29th August, 1816, and conveying the whole of lot No. 17; and thence tracing the title of said lot, and of the other lots in the block, down to the vendors of the hotel company. The descriptions contained in these several conveyances greatly varied from each other. In one of these deeds, dated the 4th February, 1823, there is a reservation of "twenty-five feet in front, *where the brick house on said lot now stands*, running back seventy-four feet nine inches at right angles;" and this reservation is continued in several subsequent deeds. In another deed, dated March 4, 1833, the description of the lot conveyed is, "that certain lot number seventeen, fronting on Gallatin street fifty feet, and extending eastwardly seventy-three feet;" and this description is continued through all the subsequent deeds, sometimes with the additional words "known as the lot formerly owned by Isaac Jamison," down to 21st October, 1847, when James Woods and wife conveyed it, as part of the "Bell Tavern Property," to R. M. Kinkle, who, on the 3d June, 1851, in like manner conveyed to Geo. W. Lane and Z. P. Davis. On the 14th March, 1856, Lane and Davis conveyed the entire property to the "trustees of the North Alabama College;" and said trustees, by deed dated the 16th April, 1857, sold and conveyed to the "Huntsville Hotel Company." In each of these last deeds, the lot is described as "part of lot number seventeen, fronting on Gallatin street fifty feet, and extending eastwardly seventy-three feet, known as the lot formerly owned by Isaac Jamison."

On the 7th February, 1870, the United States marshal sold, under execution against said hotel company, all its lands in said square, L. P. Walker becoming the purchaser, and receiving the marshal's deed. The lands were described in this deed as "lots number seventeen, eighteen, twenty-five, and twenty-six," bounded north by Clinton street, south by Randolph street, east by Jefferson street, and west by Gallatin street. On the 22d May, 1871, Walker conveyed by quit-claim deed to the plaintiffs, describing the property as it was described in the marshal's deed to him, and recit-



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ing that he became the purchaser at the marshal's sale, by the request of Reuben Chapman, for the use and benefit of Mrs. Felicia A. Chapman, his wife; that Mrs. Chapman had since died, leaving her children, the grantees, her only heirs; that he, Walker, desired to divest himself of all title to the lands, and that he conveyed to said children by the written request and direction of said Reuben Chapman, indorsed on the deed. Chapman's indorsement on the deed, which is under seal, and dated the 22d May, 1871, is in these words: "The above and foregoing conveyance is made by my request, under my instruction and direction, and is a full and complete discharge of the said L. P. Walker, of and from all duty and liability resting on him by virtue of the afore-said conveyance to him by said marshal. In witness," &c.

The documentary evidence introduced by the defendant consisted of the following deeds: 1st, a deed from Benjamin Patterson and wife to Daniel B. Turner, dated August 9, 1842; 2d, a deed from Daniel B. Turner and wife to Mrs. Lucy G. Hill, dated the 19th December, 1846; 3d, a deed from Mrs. Hill to J. D. Battle, Eugene Stroud, and James W. Steele, dated the 19th April, 1858; 4th, a deed from said Battle, Stroud and Steele, with their wives, to R. W. Chappel, dated the 20th December, 1861; and, 5th, a deed from said Chappel and wife to defendant, dated the 21st December, 1861. In Patterson's deed to Turner, the premises conveyed are described as "part of lot number seventeen in the plan of said town, lying on Clinton street, being the same on which John G. Bingham and his family formerly resided, and which was formerly owned by Isaac Jamison," with a reference to the deed under which Patterson held; and the same description is contained in the deed of Turner and wife to Mrs. Hill. The deed of Mrs. Hill to Battle, Stroud and Steele conveys three lots, or parcels of land, which are thus described: "Parts of lot number seventeen in the plan of said town, commencing at the north-west corner of *the little brick house on Gallatin street*, and running thence eastwardly, at right angles with said street, and parallel with Clinton street, seventy-four and a half feet, to a stake; thence, at right angles to Clinton street; thence, west, to the north-west corner of said lot; thence, south, along Gallatin street, to the beginning, being about sixty-seven feet, and containing not quite one-eighth of an acre. Also, another lot of land, being part of said lot number seventeen, lying east of the above-described lot, known as the lot on which John G. Bingham once lived, and owned by Isaac Jamison; sold as his property to Benjamin Patterson, by John F. Mills as sheriff; by Patterson sold to D. B. Turner, and by him to said Hill;



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bounded on the east and south by the 'Bell Tavern lot.' Also, another lot of land, being part of said lot number seventeen, bounded on the north by the lot first above described, on the east by the lot last above described, on the south by the 'Bell Tavern lot,' on the west by said Gallatin street, supposed to front on said street about twenty-five feet, and to run back east about seventy-four feet." This deed contained full covenants of warranty as to the two lots first described, but was only a quit-claim to the third lot, conveying only such title as the grantor might have, "whether good or bad." The subsequent deed of Battle *et al.* to Chappel, and Chappel's deed to the defendant, contained the same description of the lands, and each was a quit-claim only to the lot last described.

On the trial, the plaintiffs first introduced Thomas J. Taylor as a witness, "the former surveyor of Madison county, who stated that, in the early part of the year 1871, before the commencement of this suit, he made a survey and plot of the lot sued for; that he was unable to locate the lot, by any deed through which the plaintiffs claim; that it was described in said deeds as part of lot seventeen, fronting fifty feet on Gallatin street, and running east seventy-four feet, but no place of beginning or ending was given, and there was nothing referred to in the deeds by which he could locate the lot; that he located the lot by measuring the lot called for in defendant's deeds, and found that, under his deeds, he was only entitled to ninety-nine (99) feet front on Gallatin street; that this left fifty feet, for which he could find no deed, and, as no one had any deed to it, he supposed it to be the fifty feet lot called for in plaintiffs' deed; that the lot, at the time he made said survey, was inside the defendant's inclosure, and had a fence around it, and a house on it; that some one was living in the house, but he did not know who it was; that his only reason for supposing the lot to be the fifty feet called for by plaintiffs' deed was, that he could find no deed for it, and it was not included in the lots described in the defendant's deed; that the lots inclosed by the defendant fronted on Gallatin street one hundred and thirty-seven feet and six inches, while he was only entitled under his deeds to ninety-nine feet, thus overreaching on the lot supposed to be plaintiffs' thirty-eight feet and six inches on Gallatin street; and that he found, also, by measuring defendant's lot, that he had inclosed two feet on Clinton street, and running back seventy-four feet, which was not called for by his deeds." The defendant objected to the testimony of this witness, and also to the plot and survey made by him, which was introduced as a part of the testimony of the wit-

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ness; and he reserved exceptions to the overruling of his objections.

"The plaintiffs introduced Jacob Gurley as a witness, who testified, that he leased the lot in controversy after the close of the late war; that the lot then had no fence on the side fronting Gallatin street, and had a fence running about half way across the lot on the south side; that he moved the fence from the north and east side, and put it on the west and south side of the lot; that the fence on the south side, next to the hotel property, was put on the line with that portion of the fence which was standing on the south side of the lot, and running east and west; that the contract between him and Bernstein was, that he was to have the use of the place for three years, free of rent, for building the fence and house; that he remained continuously in the actual possession of the lot, as Bernstein's tenant, paying him rent, until about two months ago, when he locked up the house, gave the keys to Bernstein, and returned the lot to him; and that he was in the actual possession, as Bernstein's tenant, during all of the years 1870 and 1871."

"The plaintiffs introduced one Pollard as a witness, who stated, that he had been living in Huntsville for many years, and knew the property in controversy; that he recollected the stable which stood on lot twenty-six, which was immediately south of lot seventeen; that Mrs. Hill's lot is in lot seventeen; that she had fenced up her lot, and was living on it, and had extended her fence so as to inclose the lot on which the little brick house stood; that the little brick house lot was on the south side of her lot, and run down south to the hotel property; that the stable on lot twenty-six fronted on Randolph street, which was the southern boundary of the hotel property, and run back north to Mrs. Hill's lot; that a part of the stable was of brick, and a part frame; that he helped to build the frame part, about the year 1848; that the brick part was about sixty-five or seventy feet long, and the frame part about seventy-five or eighty feet; that Mrs. Hill's fence, on the south side of her lot, was immediately up to the stable; that he believed the house Jacob Gurley put up is not on the little brick house lot, but is on a part of the hotel lot; that he had never measured the lot, to see if it was on the hotel property, but formed his opinion by looking at the lot.

"The plaintiffs then introduced Andrew Johnson as a witness, who stated, that he married a daughter of Mrs. Hill's, and lived with her from 1846 to 1858; that there was a lot south of Mrs. Hill's lot, on which stood a little brick house; that Mrs. Hill extended her fence, and inclosed that lot, about



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1846; that said lot fronted on Gallatin street, about twenty-five feet; that Mrs. Hill continued to occupy and use that lot, until she sold it, in 1858; that she had it inclosed with a fence all the time until she sold it; that she sold it to Battle and Steele, in 1858, but did not warrant the title to the little brick house lot; that the owners of the hotel property never set up any title to the little brick house lot; that the house Gurley built, he thinks, is not on the little brick house lot, but is on the lot owned by the hotel company; that he has never measured it to see, and knows nothing of the lot in controversy.

"It was admitted, as a fact proved in the case, that the purchase of the hotel property by Walker, at the marshal's sale, was for the sole benefit of Mrs. Chapman, the mother of plaintiffs; that she was the real purchaser at said sale, and Walker had no interest in it; and that he was merely a naked trustee for Mrs. Chapman, in taking to himself the conveyance of the property by the marshal." The defendant offered to introduce, "for the purpose of showing an outstanding title," a mortgage, or deed of trust, dated the 1st January, 1861, by which the "Huntsville Hotel Company" conveyed all its property to James I. Donegan and F. L. Hammond, as trustees, to secure the payment of certain bonds which said company proposed to issue, not exceeding \$35,000, to enable it to borrow money to make necessary improvements on the property; and, in connection with said mortgage, to prove by R. W. Coltart, who was present at the sale of the property by the United States marshal, when Walker became the purchaser, "that the marshal gave notice at said sale that the property was sold subject to said mortgage, or deed of trust." The court sustained the plaintiffs' objections to this evidence, when offered separately, and when offered together; to which rulings exceptions were reserved by the defendant. The material provisions of said mortgage are quoted in the opinion of the court.

The defendant testified, as a witness for himself, "that he purchased the lot in controversy, from Chappel, in 1861, and took possession; that said lot was then inclosed with a fence, and remained inclosed until a portion was destroyed during the war; that he leased said lot, in December, 1865, to Jacob Gurley, for three years, and, in payment of the rent, said Gurley was to build a house and inclose said lot; that there was then a fence on the north and west side of the lot, and a fence running about half way across the lot on the south side; that the fence put up by Gurley was on the south and west side of the lot; that the fence on the west of the lot runs along Gallatin street, and the fence on the south side



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was on a line with (and a continuation of) the fence already standing, just in a direct line west to Gallatin street; that all the fencing is on the same lines that stood in 1861, when he purchased said lot; that Gurley took possession of the lot under said lease, in December, 1865, and built a house on it, and fenced it up, and resided on it continuously, without interruption, as his tenant, until about two months ago, when said Gurley returned the possession to him; that said Gurley was in possession, as his tenant, when Walker purchased the hotel property at the marshal's sale, and was in actual possession, as his tenant, when this suit was commenced; that no one ever claimed said lot, after his purchase from said Chappel, as part of the hotel property, until plaintiffs set up their claim just before the commencement of this suit; that he was in possession of said lot, by his tenant, claiming *bona fide* title thereto, at the time of said marshal's sale; that he has never measured said lot, but claimed inside of his inclosure; that the only deed he claimed under was the said deed from Chappel, and he never claimed the lot sued for as bought from any one else." The defendant also introduced Z. P. Davis as a witness, who was one of the former owners of the hotel property, and one of the grantors through whom the plaintiffs deduced their title; and who testified, that he never claimed the lot in controversy as a part of the hotel property, and did not think it was called for by his deeds. There was other evidence, also, on the part of the defendant, tending to show that the lot was not claimed or recognized as belonging to the hotel property.

The court charged the jury as follows:

"When an action is brought for the recovery of land, the plaintiffs must, as a general rule, 1st, be entitled to sue; 2d, must sue one in the possession of the land; and, 3d, show a title or right to the possession of the land superior to that of the defendant. No one, however good his title may be, can convey his right, or make a good title to another, of land which some other person has in adverse possession, claiming title thereto. This rule does not apply to sales made by a sheriff, or marshal of the United States court, under executions. But a purchaser at a sheriff's or marshal's sale can not sell the land he buys, when some one else is in adverse possession thereof. He must first recover the possession from the adverse holder. An exception to this rule exists, where the purchaser at the sheriff's or marshal's sale has purchased for another, and not for himself. In such case, he could be compelled, by bill in chancery, to make a deed to those for whom he purchased; and without such compulsion, he has the right, and ought to make it, even though, at

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the time of making it, another was in adverse possession under claim of title, and such deed would vest the title in the grantees.

"2. An action of trespass to try title must be brought against one in the actual possession of the land, as a general rule. But, if one who claims land of which, through his tenant, he has constructive possession only, but not actual possession, says anything to induce one who also claims the land to bring suit against him, and such one is induced so to do by these statements; then the defendant in such suit is estopped, by reason of his acts, from denying his actual possession of the premises sued for, and must be regarded as properly occupying the position of defendant, which he has voluntarily assumed to be.

"3. As to the title, and the proof thereof, ordinarily, title to land is shown by written evidence—a patent from the United States, and deeds from the patentee to the plaintiffs, or to those from whom they claim, in regular procession, down to the plaintiffs. But, in this case, the defendant has tendered the plea of the statute of limitations of ten years, which, if sustained by the proof, is sufficient for his defense. For it is the law, that the uninterrupted, adverse possession of lands, under claim of title, for ten years, vests in the occupant a title to the land, upon which he may recover or defend successfully, in such a suit as this.

"If you believe, from the deeds and maps, that Jamison owned all of lot No. 17, except twenty-five feet fronting on Gallatin street, and that he conveyed by deed sixty-seven feet and six inches, from the corner of Clinton down, and fronting Gallatin street, at one time; and that twenty-five feet on the same street was sold at another, and seven feet for an alley at another, and that was all the land sold to the vendors of the defendant; then you have the right to infer that the fifty feet sued for in this case was not included in the purchase of the defendant, but was the fifty feet purchased by the one under whom the plaintiffs claim; and that the ninety-nine feet six inches, exclusive of this fifty feet, and commencing at the corner of Clinton street, was all the defendant was entitled to by his deeds of conveyance.

"If one purchases land from another, and takes a deed of conveyance therefor, the jury may infer that the land mentioned in the deed was all he purchased at the time. When a person takes possession of land without a deed, and incloses it, improves it, and exercises open and notorious acts of ownership over it, his improvements and inclosure limit the extent of his adverse possession. But, if he takes possession of land under a deed, the deed shows the extent of



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the adverse possession; and if a party takes possession of land not called for in his deed, his possession is not adverse as to the portion not called for in his deed. Apply these principles to the facts, as proven in this case, and render your verdict."

"Defendant excepted to the charge of the court, and asked the court to give the following written charges to the jury; each of said charges being first reduced to writing, and the court asked to give them to the jury as written charges:

"2. If you find, from the evidence, that at the time plaintiffs commenced this suit, Jacob Gurley was in the actual possession of the lot, as a tenant of the defendant, you must find for the defendant.

"3. If Jacob Gurley was in the actual possession of the lot at the time this suit was commenced, the mere verbal declaration of possession by Bernstein would not authorize the plaintiffs to bring the suit against him, and you must find for the defendant.

"4. Before the plaintiffs can recover in this action, they must prove that, at the time Walker made the deed to them, he, Walker, was in the possession of the lot, claiming the same, or exercising acts of ownership over it; and if plaintiffs have failed to prove this, you must find for the defendant.

"5. If you find from the evidence that, at the time the marshal sold the lot to Walker, Bernstein was in the possession of the lot, either himself or by his tenant, claiming title, Walker did not purchase a perfect legal title, but only a right of property which could be reduced to possession by action; and Walker could not convey a title to plaintiffs, unless he reduced the lot to possession before making deed.

"7. If, at the time Walker purchased the lot sued for at the marshal's sale, Bernstein, either by himself or tenant, was in possession of the lot, exercising acts of ownership over it, and claiming it as the property of Bernstein, then Walker did not purchase a perfect title, but only a right of property, which could be reduced to possession; and if Walker conveyed the lot to the plaintiffs, while it was in the possession of Bernstein, or his tenant, the deed is void as to Bernstein, and you must find for the defendant.

"8. If Bernstein, either by himself or his tenant, was in the possession of the lot sued for, claiming as Bernstein's property, and exercising acts of ownership over it, at the time the marshal sold it to Walker, and continued such possession up to and subsequent to the time Walker conveyed the property to the plaintiffs in this suit; then the deed of Walker is void as to Bernstein, and you must find for the defendant.



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"9. If, at the time Walker purchased the lot sued for, at the marshal's sale, Bernstein, either by himself or tenant, was in possession of said lot, asserting *bona fide* claim of title to said lot, and exercising acts of ownership over it, and continued such possession until the commencement of this suit; and Walker conveyed said lot to plaintiffs, without reducing the lot to possession; the deed is void as to Bernstein, and the plaintiffs cannot recover in this suit.

"11. If you find that Bernstein, and those through whom he claims, have had possession of said lot sued for, claiming it as their own property, and exercising open and notorious acts of ownership over it, such as fencing it up, and cultivating or improving it, and have continued such possession for more than ten years before the commencement of this suit; such possession, of itself, gives the defendant a title by lapse of time, although there was no color of title, and the original entry on the lot was a trespass; and you must find for the defendant.

"12. If plaintiffs' attorney, at the time of the interview with Bernstein, knew that Jacob Gurley was in the actual possession of the lot sued for, the verbal declaration of Bernstein, that he was in possession of the lot, would not estop Bernstein from showing that he was not in possession of the lot.

"13. If you find that Mrs. Hill fenced up the lot sued for, and exercised acts of ownership over it, and sold it; if her possession, added to the possession of the persons to whom she sold, makes ten years before the commencement of this suit; then the defendant has a title to the lot by lapse of time, and you cannot find for the plaintiffs.

"16. If there is nothing contained in the deed, by which the lot can be identified and located, it is void for uncertainty.

"17. If the deed shows, upon its face, that the description of the lot is so uncertain and indefinite that it cannot be located and identified, then it is a patent ambiguity, and cannot be helped by extraneous circumstances, and is void for uncertainty.

"18. If the deed does not describe the lots by metes and bounds—if there are no monuments referred to in the deed; no abutments given in the deed, and nothing referred to in the deed by which the lot can be identified and located, the deed is void for uncertainty.

"21. When plaintiffs rely upon a deed to show title, they must show title by matter contained in the deed.

"22. Plaintiffs cannot prove any extraneous circumstances, not referred to in *his* deed, to identify and locate the lot,

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when the description in the deed shows upon its face that it is void for uncertainty.

"23. If the plaintiff's deed, describing the land, is so indefinite and uncertain that it cannot be identified and located, the plaintiff cannot prove his title by showing that the defendant has no deed calling for the lot in controversy.

"24. If Z. P. Davis and G. W. Lane, through whom plaintiffs claim title to the lot in controversy, recognized and treated Mrs. Hill's fence as the boundary of the hotel property; and Mrs. Hill, and those who claimed title to the lot through her, occupied and claimed all the lot up to the fence, for more than ten years before this suit, then the fence would be the boundary between the two proprietors, whether the fence was on the true line or not.

"25. If you find from the evidence that the description of the lot sued for is so indefinite and uncertain in plaintiffs' deeds, that it can not be identified and located by matters contained in their deed, or by anything referred to in their deed, plaintiffs can not prove their title by showing that defendant has none, and measuring off the land called for by his deed, and claiming that portion not called for in his deed."

"The court refused to give each and all of said written charges, numbering from 2 to 25, both inclusive, and defendants excepted to the action of the court in refusing to give each and all of said charges. And now, to the ruling of the court in refusing to allow the said mortgage, or deed of trust, to Donegan and Hammond, to go to the jury as evidence, and to the refusal of the court to allow the testimony of R. W. Coltart to go to the jury as evidence, and to the general charge of the court, and to the refusal of the court to give the written charges asked by the defendant, the defendant excepts," &c.

The several rulings of the court on the evidence, and in the charges given and refused, to which exceptions were reserved, as above stated, are now assigned as error.

BRANDON & JONES, for appellant.—1. In ejectment, the plaintiff can not recover, unless he had, at the commencement of the action, a legal (as distinguished from an equitable) right, and the right of possession.—*Williams v. Harts-horn*, 30 Ala. 211. And he must recover on the strength of his own title, without regard to the strength or weakness of the defendant's title.—*Brock v. Younge*, 4 Ala. 584.

2. The description in the several deeds under which plaintiffs derive title is, "also, part of lot number seventeen, fronting on Gallatin street fifty feet, and extending eastwardly seventy-three feet." According to the testimony of

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the practical surveyors, the lot can not be located by this description, no point of beginning or ending being given; and the deeds are void for indefiniteness and uncertainty, on account of this patent ambiguity.—*Pollard v. Maddox*, 28 Ala. 321–25; *Boardman v. Reed & Ford*, 6 Peters, 328; *Cooper v. Glover*, 4 Mass. 305; 1 Greenl. Ev. §§ 297, 300, 301, 350. The plaintiffs must prove a continuous title—a complete chain; and if any of the deeds in the chain of title are void, lapse of time will not prove them, and the whole title fails.—*Jenkins v. Noel*, 3 Stew. 60; *Hathaway v. Clark*, 5 Pick. 490; 1 Greenl. Ev. §§ 25–6.

3. If Walker's deed to plaintiffs conveys the lot sued for, the defendant should have been allowed to prove the outstanding title in Donegan and Hammond. Walker, by his purchase at the marshal's sale, acquired only the equity of redemption in the mortgaged premises; and that is all he conveyed to the plaintiffs, if he could convey that much. *Barker v. Bell*, 37 Ala. 354; 31 Maine, 246; 13 Vermont, 129. But Walker's purchase was for the benefit of Mrs. Chapman; and on her death, her husband was entitled to a life-estate, and the remainder was in her children. Chapman's consent that Walker should convey to the children, does not relieve the deed of its champertous feature; it is the same, in effect, as a deed from Walker to Chapman, and from Chapman to the children, which would be champertous.—*Dexter & Allen v. Nelson*, 6 Ala. 68; *Pryor & Fisher v. Butler*, 9 Ala. 421; *Abercrombie v. Baldwin*, 15 Ala. 371; *Coleman v. Hair*, 22 Ala. 598.

4. But the proof shows, beyond all controversy, that the land was in the actual adverse possession of Bernstein, by his tenant, at the time of the marshal's sale, and long prior thereto; and Walker did not acquire, by his purchase at the marshal's sale, any title which he could convey to another, so as to authorize his alienee to recover against Bernstein. Authorities last above cited; also, *Farley v. Smith*, 39 Ala. 58; *Hines v. Chancey*, 47 Ala. 637.

5. Color of title is not necessary to constitute adverse possession, under the decisions of this court; and this is the settled law in Alabama.—*Herbert v. Hanrick*, 16 Ala. 595; *Benje v. Creagh*, 21 Ala. 151; *Farley v. Smith*, 39 Ala. 58; *Rivers v. Thompson*, 43 Ala. 641. See, also, Angell on Limitations, 390; *Kinchaloe v. Tracewell*, 11 Grattan, 587.

6. Possession by Bernstein, and those to whose estate and rights he has succeeded, claiming the lot as their own property, and exercising open and notorious acts of ownership, such as inclosing, cultivating, and improving it; such possession continuing for more than ten years before the com-



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mencement of the suit, without interruption or challenge of their right,—gave defendant a title by lapse of time, although there may have been no color of title, and although the original entry was a trespass.—*Hinton v. Nelms*, 13 Ala. 222; *Herbert v. Hanrick*, 16 Ala. 595; *Benje v. Creagh*, 21 Ala. 151; *Farmer v. Estava*, 11 Ala. 1028; Tyler on Ejectment, 126–7, 863–4, 869; *Payne's Lessee v. Skinner*, 8 Ohio, 159; *Bauman v. Grubbs*, 26 Indiana, 419; *Abram's Lessee v. Will*, 6 Ohio, 164; *Doe v. Herrick*, 14 Indiana, 242; *Overfield v. Christie*, 7 Serg. & R. 177; 2 Penn. 452.

7. When co-terminous proprietors recognize and treat a division fence as the boundary line between them, each claiming up to the fence, and this continues for more than ten years before suit; the fence becomes the boundary between the proprietors, whether it is on the line or not, and each is bound by it.—Angell on Limitations, § 393; *Brown v. McKinney*, 9 Wharton's Pa. Rep. 567; *Burrell v. Burrell*, 11 Mass. 296; *Brown v. Cockerell*, 53 Ala. 38–46.

8. The 4th, 5th, 7th, 8th, and 9th, of the charges asked by the defendant below, are supported by the following cases, and should have been given.—*Hines v. Chancey*, 47 Ala. 637; *Clay v. Wyatt*, 6 J. J. Mar. 584; *Young v. McCampbell*, 6 J. J. Mar. 490; *Dubois v. Marshall*, 3 Dana, 336; *Frizzle v. Beach*, 1 Dana, 211; *Jones v. Chiles*, 2 Dana, 35; *Saunders v. Groves*, 2 J. J. Mar. 407; *Violett v. Violett*, 2 Dana, 325; *Coleman v. Hair*, 22 Ala. 596; *Dexter v. Nelson*, 6 Ala. 68; *Pryor v. Butler*, 9 Ala. 409; *Abercrombie v. Baldwin*, 15 Ala. 363.

9. The 2d charge asked should have been given. Its refusal instructed the jury, in effect, that it is not necessary, in actions of ejectment, to sue the party in actual possession. *Greenlee v. Bonner*, 6 Ala. 411; *Gayle v. Smith*, at June term, 1874; *Barbour on Parties*, 265–7; *Pope v. Peulergast*, 1 Mar. Ky. 122; *Cooley v. Penfield*, 1 Vermont, 244; *Stevens v. Griffin*, 8 Vermont, 448.

HUMES & GORDON, *contra*.—1. The general rule is, as stated by the court in the charge to the jury, that an action of ejectment must be brought against the party in actual possession. But, in this case, the defendant is estopped from denying his possession—1st, by his pleadings; and, 2d, by his declarations before suit brought, on the faith of which the action was brought against him. The plea of not guilty is an admission of possession, and is equivalent to the consent rule at common law.—Rev. Code, §§ 2613–14; *King v. Kent's Heirs*, 29 Ala. 542; *Sledye v. Swift*, 51 Ala. 386; *Tillinghast's Adams*, 262, n. 4; 13 Mass. 259; 12 Cal. 403; *Tongue v. Nutwell*, 17 Md. 212; 8 Cush. 183; 2 Greenl. Ev.

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§ 556; *Howard v. Kennedy*, 4 Ala. 592. That the defendant is estopped by his admissions of possession, in consequence of which the action was brought against him, see *McCravey v. Remson*, 19 Ala. 430; *Harrison v. Pool*, 16 Ala. 167; *Stone v. Britton*, 22 Ala. 543; *Grace v. McKissack*, 49 Ala. 163; *McCabe v. Raney*, 32 Indiana, 309; *Halloran v. Whitcomb*, 43 Vermont, 306; *Abeel v. Gelder*, 36 N. Y. 514; 47 N. Y. 493; 5 Bos. & P. 330.

2. The first plea is a disclaimer, as to the entire premises sued for; and this, in legal effect, is an estoppel by record, and an admission of plaintiffs' title.—*Stearnes on Real Actions*, 222; *Greeley v. Thomas*, 56 Penn. St. 35; *Ford v. Sampson*, 30 Barbour, 183.

3. The defendant is a mere naked trespasser, and can not defeat a recovery by plaintiffs by setting up an outstanding title in another, or adverse possession in himself.—*Herbert v. Hanrick*, 16 Ala. 581, 595; *Rivers v. Thompson*, 46 Ala. 338; *Jackson v. Hurder*, 4 John. 202; 3 Duer, 35; *Clarke v. Clarke*, 51 Ala. 498; 3 Stew. & P. 184.

4. The doctrine of champerty does not apply to judicial sales, nor to naked trust estates, whether created by the act of the parties, or by operation and construction of law. Hence, Walker might lawfully buy at the marshal's sale, and might lawfully convey to the plaintiffs, notwithstanding any claim of adverse possession by defendant.—*Baker v. Whiting*; 3 Sumner, 475–83; *Wood v. Griffith*, 1 Swanst. 56; *Allen v. Smith*, 1 Leigh, Va. 231–48.

5. The mortgage, or deed of trust, to Donegan and Hammond, reserves the possession, and other valuable rights, to the mortgagor; and these rights passed to Walker by his purchase at the marshal's sale, and gave him a title which would support ejectment. There is no proof of any default on the part of the mortgagor.

6. Chapman had no life-estate in the property purchased and held by Walker for the benefit of Mrs. Chapman; her estate therein being an equitable (as distinguished from a statutory) separate estate.—*Willis v. Cadenhead*, 28 Ala. 474; *Short v. Battle*, 52 Ala. 456.

7. The general exception to the affirmative charge of the court can not be sustained, unless the entire charge is erroneous.—*Owens v. The State*, 52 Ala. 400; *S. & N. Railroad Co. v. Jones*, at the last term.

STONE, J.—Many of the questions that have been argued with much ability, are not so presented that we can consider them. The affirmative, general charge given covers all, or most, of the questions raised by the evidence. There was a

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general exception to this charge, without specifying any particular part or parts objected to. Many of its propositions are clearly free from error; and under a well-established rule of this court, we will not dissect it, with a view of ascertaining if there may not have been error in some of its utterances. Exceptions to a general charge, unless all be erroneous, must point out the parts objected to, else we will not consider them.—*Owens v. The State*, 52 Ala. 400; *South and North Ala. R. R. Co. v. Jones*, at December term, 1876.

2. The defendant interposed several pleas, and among them the general issue, "not guilty." He had also entered a disclaimer, denying that he was in possession of the lots sued for, at the time the action was brought. These defenses are incompatible, and one must overrule the other. A plea of not guilty "is an admission by defendant that he is in the possession of the premises sued for."—Code of 1876, §§ 2962-3. It is equivalent to the consent rule, which required the defendant, as a condition to controverting lessor's title, to admit the truth of the fictitious averments of lease, entry, and ouster.—See 24th Rule of Practice in Circuit Courts; *King v. Kent*, 29 Ala. 542, 556; *Clarke v. Clarke*, 51 Ala. 498; *Sledge v. Swift*, 51 Ala. 386. Under the case last cited, the defendant might have been forced to admit his possession of the premises; and refusing, his pleas might have been stricken out. We suppose this question was not brought to the notice of the Circuit Court. Had it been done, the court would have offered to the defendant the option of adhering to his disclaimer, and abandoning his pleas, or of entering into the consent rule, and going to trial on his pleas. We feel bound to hold that, by interposing the plea of not guilty, the defendant must be held to have waived his disclaimer, and to have admitted himself in possession. So, the defense that defendant was not in possession when the action was brought, in whatever form presented, will not be further noticed in this opinion. This disposes of defendant's charges numbered 2, 3, 12.

3 Several charges were asked and refused, which, in terms, referred the question of construing deeds to the jury. Charges numbered 16, 17, 18, 21, and 23, are of this class. It is the duty of the court to construe written instruments, and it is error to refer such question to the jury.—See *Price v. Mazinge*, 31 Ala. 701; *Taylor v. Kelly*, *Ib.* 59. The court did not err in refusing these charges.

4. Charge No. 22 is somewhat obnoxious to the same objection. Asked, as it was, in connection with the charges last commented on, it was doubtless intended, and would have been so understood by the jury, as referring to them



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the construction of some deed. Many deeds were in evidence, and the charge failed to inform the jury, and fails to inform us, what deed—it used the singular number—was referred to. The language of the charge is, “Plaintiffs can not prove any extraneous circumstances, not referred to in his deed, to identify and locate the lot, when the description in the deed shows upon its face that it is void for uncertainty.” The charge speaks of *his*, the plaintiffs’, deed. The most natural inference is, that this refers to the deed made by Walker to plaintiffs. Yet, there is nothing uncertain or ambiguous in the description of the land it conveys. We think this charge objectionable on two grounds: *first*, it refers to the jury the construction of a deed; and, *second*, it is indefinite, and its tendency would have been to mislead the jury.—1 Brickell’s Dig. 338-9, §§ 36, 59, 60, 61.

5. Charges 11, 13, 24 and 25 relate to the statute of limitations of ten years. This action was commenced July 12, 1871. We know judicially that the late civil war prevailed from 1861 to 1865; and the statutes of limitation were suspended from January 11, 1861, to September 21, 1865; four years, eight months, and ten days. This suspension occurred, mainly, within the ten years immediately preceding the bringing of this suit. To effect a bar, at the time shown in this record, the adverse holding must have continued fourteen years, eight months, and ten days. Yet, each of the charges fixes the requisite time at ten years. These charges were all rightly refused.

We have now disposed of all the charges, except the 4th, 5th, 7th, 8th, and 9th. These we will consider hereafter. It is contended for appellant, that he should have been allowed to show outstanding title in Donegan and Hammond. For this purpose, he offered in evidence the mortgage, or trust deed, made June 1, 1861, by the “Huntsville Hotel Company,” to Donegan and Hammond, by which it is claimed the lots in controversy were conveyed, leaving only an equity of redemption in the hotel company. Plaintiffs claim derivatively under the hotel company, by marshal’s sale under execution against the company, made in 1870, purchase at such sale by Walker, and conveyance by him to plaintiffs before this suit was brought. In connection with this mortgage, defendant offered the testimony of Coltart, and proposed to prove by him that, when the marshal exposed said property for sale, he proposed to sell only the interest of the said hotel company, subject to said mortgage to Donegan and Hammond. These two instruments of evidence were offered jointly, and each separately; and in each

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form it was ruled out, on the objection of plaintiffs; and in each form, the question is presented by exception.

The mortgage, or trust deed, conveys the real and personal property of the Huntsville Hotel Company, to secure the payment, both interest and principal, of thirty-five thousand dollars of bonds the company proposed to issue, with eight per cent. interest, payable semi-annually; the principal of the bonds to be due and payable in five equal installments, of seven thousand dollars each, due on the first of January from the years 1872 to 1876, each inclusive. But the mortgage, after the granting clause, contains this language: "But, nothing herein contained shall be so construed as to prevent the Huntsville Hotel Company from using the building for hotel purposes, renting, and receiving pay therefor, of any part of said building not necessary for hotel, nor from disposing of any part of the lot or grounds upon which said building is situated, which may not be required for the use of said hotel; nor from using any furniture, stores, or fixtures, which may be necessary in conducting the business of said company, provided that no default shall have been made in the payment of the interest and principal of said bonds." The record nowhere informs us that the hotel company had made default in the payment of interest or principal of the bonds—(no part of the principal was due when this suit was brought)—that they had been disturbed in the quiet enjoyment of the property, or that Donegan and Hammond had asserted any right to the possession; and there was no offer to prove either of the above facts.

6. If the mortgage had reserved no right of possession in the mortgagor, or had been an ordinary one fixing a law-day, and that day had passed; then, under our rulings, there would have remained in the hotel company only an equity; and neither Walker, by his purchase, nor any one in his right, would have acquired any legal title, which is necessary to maintain ejectment; and in such case, the mortgage would constitute such outstanding title in a stranger, as would defeat a recovery, on a title such as these plaintiffs rely on. But the present mortgage is different. It secures the possession and enjoyment in the mortgagor, until default is made; and it reserves to the mortgagor powers and rights of use and disposition not often found in mortgages. Until default was made, there was clearly a legal right to hold and occupy the property, which was subject to levy and sale; and such sale, in the absence of other proof, would vest in the purchaser a right to maintain ejectment against any one who did not show a paramount title.—*Paulling v. Mead*,

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32 Ala. 11; *Barker v. Bell*, 37 Ala. 354-8; *Pryor v. Butler*, 9 Ala. 418.

7. It is contended that the present action can not be maintained, because plaintiffs' deed from Walker—the title they rely on—was executed while the lots in controversy were adversely held and occupied by defendant, under claim of right. Charges 4, 5, 7, 8, and 9, seek to raise this question. It is fairly presented in the last four, if the facts of this case justify the application of the principle. The admitted facts, on which this question arises, are—that Walker purchased at the marshal's sale, not for himself, or in his own right, but in trust for Mrs. Chapman, mother of the plaintiffs. The money and means with which the purchase was made, were furnished by Reuben Chapman, her husband, and the title was made to Walker, in trust for Mrs. Chapman, at the request of Mr. Chapman. Walker neither paid, nor incurred liability to pay, any money; and the record fails to inform us for what purpose the title was taken in him, instead of Mrs. Chapman. Mrs. Chapman soon afterwards died, leaving the title in Walker; and soon after this Walker conveyed by quit-claim all the interest he had in the lands, to the plaintiffs, reciting substantially the above facts, and that the title was conveyed to the heirs of Mrs. Chapman, at the request of Reuben Chapman, and the said Reuben indorsed on the deed his written assent to such conveyance. This conveyance, it is alleged, is obnoxious to the charge of maintenance, and therefore inoperative to convey the title. The testimony tends to show that, at the time this conveyance was made, Bernstein, by his tenant, was in possession of the land sued for, and asserted ownership and dominion over it; and it is contended that the conveyance was nothing more than a transfer of a right to sue, and therefore it will not support an action.

Against this view it is answered, that Walker had no interest in the premises—held the title in the nature of a naked trust; was compellable in equity to convey the title to Mrs. Chapman, his *cestui que trust*; that, in conveying title to her heirs-at-law, she being dead, he voluntarily did only what equity would have compelled him to do; that equity approves and regards as well done, that which ought to have been done; and that therefore this conveyance does not fall within the influence of the rule against maintenance. To this it is replied, that by the death of Mrs. Chapman—intestate, so far as we know—Reuben Chapman, her surviving husband, became entitled to a life-estate in the premises in controversy; and that the deed of Walker to plaintiffs, made as it was by the “written request,” and under the “instruction



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and direction" of Reuben Chapman, indorsed on the deed, is more than a mere execution of what equity would have compelled him to do; that it is a conveyance to them of the life-estate of said Chapman, which they did not previously own, either legally or equitably; and that, therefore, the deed was but a transfer of a right to recover the property by suit, which has all the qualities of maintenance.

The question we are required to decide is founded on a very ancient doctrine, partly common law, and partly statutory. In Coke upon Littleton, 369 *a*, it is said, "that feoffments made for maintenance shall be holden for none, and of no value; so as Littleton putteth his case, at the common law; . . . but some have said, the feoffment is not void between the feoffor and feoffee, but to him that hath right." This author adds, speaking of the statute of 32 Henry 8, ch. 9: "Since Littleton wrote, there is a notable statute made in suppression of the causes of unlawful maintenance (which is the most dangerous enemy that justice hath), the effect of which statute is—first, that no person shall bargain, buy, or sell, or obtain any pretended rights or titles; secondly, or take, promise, grant, or covenant, to have any right or title of any person, in or to any lands, tenements, or hereditaments; but, if such person, which so shall bargain, &c., their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year, &c., upon pain to forfeit the whole value of the lands, &c., and the buyer or taker, &c., knowing the same, to forfeit also the value. Thirdly, provided that it shall be lawful for any person, being in lawful possession, by taking of the yearly farm, rents, or profits, to obtain and get the pretended right or title, &c., of any lands, whereof he or they shall be in lawful possession." So, in Cro. Eliz. 445—*Upton v. Bassett*—the court said, "A feoffment upon maintenance or champerty is not void against the feoffor, but against him who hath right."

It is manifest that this doctrine of the common law, emphasized and made more efficient by statute, had its origin in the Feudal times, when feudal barons exercised power and authority over their vassals, and over the machinery of civil government, only subordinate to the will of an arbitrary king. The necessity for such legislation does not exist in this country of free constitutions, as it did in England, when the haughty feudal lords governed, within their sub-dominions, with despotic rule, and frequently made war, and often successfully, upon their own sovereigns. Hence, the forfeitures, and the denial of the right to aid a suitor by money

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or advice in prosecution or defense of his rights, have never been engrafted on our jurisprudence. But, two of the principles of the common law and English statute, noted above, have been adjudged to be of force in this State: first, champerty, not necessary to be considered here (See 1 Brick. Dig. 334); second, a denial of the right to sell or buy real or personal property, the right to which exists only in action, and to maintain a suit in the name of the purchaser. This is treated as a species of maintenance, and is everywhere adjudged to be a complete bar to a suit by the purchaser, to recover such property, or damages for tortious injuries done to it. Damages caused by torts can not, in the ordinary acceptance of the term, be the subject of private bargain and sale.

In *Pryor v. Butler*, 9 Ala. 418, this court said: "The right acquired by Bullard, who purchased at the sale made under the mortgage, was a right to recover the lot by suit, if the possession was in another, and the possession was withheld. This right to sue, he could not transfer to another. It is an ancient doctrine of the common law, that nothing which lies in action, entry, or re-entry, can be granted over." To the same effect, see *Dexter v. Nelson*, 6 Ala. 68; *Abercrombie v. Baldwin*, 15 Ala. 363; *Abernathy v. Boazman*, 24 Ala. 189; *David v. Shepard*, 40 Ala. 587; *Hines v. Chancey*, 47 Ala. 637. See, also, this point in *Coleman v. Hair*, 22 Ala. 596. See, also, *Gibson v. Shearer*, 1 Murphy, 114; *Hadley v. Geiger*, 4 Halst. 225; *Williams v. Hogan*, Meigs, Tenn. 187; *Allen v. Smith*, 1 Leigh, 231; *Martin v. Pace*, 6 Blackf. 99; *Dubois v. Marshall*, 3 Dana, 336; *Jackson v. Demont*, 9 Johns. 55; *Van Hoesen v. Benham*, 15 Wend. 164; Rawle on Covenants, 65. And it is settled in this State, that, to avoid a deed thus made by one out of possession, it is enough if there be one in adverse possession, exercising acts of ownership, and claiming to be rightfully in possession. Color of title is not necessary. On the subject of transfer of mere rights to sue, see 1 Chitty's Pl. 17, 66; 1 Addison on Contracts, § 257.

In Tyler on Ejectment, commencing at page 935, is a pretty full discussion of this doctrine. He states it as "a general rule of the common law, that a conveyance of land, by a person against whom it was adversely held at the time of making it, is absolutely void; and the reason of this rule, according to an ancient authority, is 'for avoiding of maintenance, suppression of right, and stirring up of suits;' and therefore nothing in action, entry, or re-entry, can be granted over." *Absolutely void* is too strong a phrase. Such conveyance is good and binding, at least by way of estoppel, between the parties. The same author remarks, citing many

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authorities, that, "so far as the law declares that a conveyance by a person out of possession, where the land is held adversely to the grantor, is void, the rule is quite generally recognized in all the American States."

In White & Tudor's Leading Cases, 4th Amer. ed., vol. 2, part 2, page 1631, is a very full discussion of the doctrine, English and American. It is there said: "The rule, that land held adversely shall not be granted, was too deeply fixed in the common law, to yield to the novel doctrine, that rights of action are not less objects of commerce, than rights attended with possession; and the assignment of a right of entry, or a contract made in consideration of such transfer, is still, in many of the States, invalid." The annotators cite many authorities in support of this proposition, and, among others, *Poe v. Davis*, 29 Ala. 676; an opinion by Chief Justice CHILTON, in which he places the doctrine against champerty and maintenance on very elevated ground. Among other strong expressions found in C. J. CHILTON's opinion, is the following, quoted from Lord Abinger in *Prosser v. Edwards*, 1 Younge & Col. 484: "All our cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights, which others are not disposed to enforce." Commenting on a relaxation of the doctrine which will be found referred to in Tyler on Ejectment, and White & Tudor's Leading Cases, *supra*, C. J. CHILTON said: "Some of the recent cases do, indeed, relax the rules which have heretofore obtained; but we apprehend, when fully considered, they do not go the length of breaking down the barrier which the wisdom of ages has erected against the perversion of the cause of justice, by opening a door for strangers to come in and interfere in suits in which they have no interest, aside from the agreement they may make to maintain them."

The language of the New York statute is, "Every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." It will be observed that, under this statute, the adverse holding, to avoid a conveyance made by one out of possession, must be *under a title*. Adverse holding under claim of ownership is not enough. The claim, to avail, must be under some specific title. Under this statute, the rulings in that State have somewhat relaxed the rule.—See *Crary v. Goodman*, 22 N. Y. 170; *Laverty v. Moore*, 33 N. Y. 358; *Livingston v. Peru Iron Co.* 9 Wend. 511. In *Requa v. Holmes*, 26 N. Y. 338, and *Thalheimer v. Brinkerhoff*, 3 Cow. 623, the relaxation of



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the rule is carried to a doubtful length. Our rulings have been steadfast and uniform, and have maintained throughout that there can be no action maintained by a transferee of the title, against one in possession, claiming adversely at the time of the transfer. The principle, with us, rests on the common law, and does not require that the adverse holder shall claim under a specific title: sufficient that he is in possession, asserts the right to retain the possession, and that his claim is adverse to that of plaintiff's grantor.

It will be observed, in the many cases on this question, we do not encounter the expressions *vendor*, or *purchaser*, except in contradistinction to a transmission of title by descent. The latter change of title is effected by the law, and does not fall within the rule. Conveyance, grant, deed, transfer; these are the words we meet with. The right to sue can not be conveyed, transferred, or granted to another, is the language of the courts. Such is the language employed in our adjudged cases.

In the case of *Clay v. Wyatt*, 6 J. J. Marsh. 583, Green Clay, in consideration of \$100, and natural love and affection, conveyed to his sons various tracts of land. Part of the land so conveyed was, at the time, in the adverse possession of Wyatt, against whom an action of ejectment was instituted, by the sons. The court said: "That the deed is void, so far as it may operate upon the land in the adverse possession of Wyatt, according to the literal meaning of the act, is too plain to admit of any doubt. But it is contended, that such a deed as the present, being obviously intended by the grantor for the advancement of his children, does not come within the spirit of the act, and that the legislature used the word purchase in its popular, and not in its technical sense; wherefore, it is insisted, that the deed is not void. The principal object of the legislature, in passing the act in question, was to protect the occupants of land. A father might have claims which he would be unwilling to litigate in his own name, because of his liability for costs, and which he would willingly transfer to a son, a nephew, or a cousin, in consideration of natural love, and afford him an opportunity to profit by the litigation. Such a transaction would tend to defeat the main object of the legislature, which was, to throw obstacles in the way of asserting doubtful rights, to the prejudice of occupants; and hence we think the policy of the act includes voluntary conveyances, as well as those founded on valuable considerations." This asserts a sound rule, and gives sound reasons in support of it.

In the present record, according to the agreed facts, at the death of Mrs. Chapman, Mr. Chapman, her husband, became

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entitled to a life-estate in the property in controversy. The conveyance by Walker to the plaintiffs, made by the procurement and direction of Chapman, is the equivalent of a conveyance by the latter of a life-estate in the premises; for that was the *quantum* of his interest. That life-estate, so long as Chapman lived, was the only right, outside of Walker, the trustee, which could litigate, at the time, the right to the property. That right, and the legal title transferred to them by Walker's deed, constitute plaintiffs' sole right to maintain this suit. These being the facts, if, at the time Walker made his deed, Bernstein, or his tenant, was in adverse possession, claiming right to such possession, then plaintiffs can not maintain this suit. The 8th charge asked should have been given.

Three points we abstain from considering, as not being presented by this record: First, the construction of Acklen's deed, and those in continuation, conveying part of lot 17, fronting 50 feet on Gallatin street, whether void for uncertainty; second, whether Mrs. Hill's deed, and those down to Bernstein, embrace the lot in controversy; third, whether Bernstein's possession is sufficiently connected with Mrs. Hill's, to authorize the tacking of hers to his, to make out the bar of the statute.

For the single error above pointed out, the judgment of the Circuit Court is reversed, and the cause is remanded.

BRICKELL, C. J., not sitting, having been of counsel.

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### *Bill in Equity for Construction of Will, Account, &c.*

1. Devise to "family of deceased son" during widowhood of his widow, with limitation over to his sons.—Under a bequest and devise of lands and slaves "to the family of my deceased son Felix," consisting of his widow Sarah, two sons, and a daughter, with a direction that the property "shall be kept together and managed by the executors, during the widowhood of the said Sarah, for the benefit of herself and children; but, in the event of her marriage, she is to receive a child's part of the negroes," with some other personal property, "which property shall be hers for and during her natural life," but with a restriction against the removal of the slaves from the State; followed by these words: "The land devised for the benefit of the family of my deceased son Felix, I give to my grandsons, Benjamin and Francis," the sons of Felix. "to be equally divided between them when the younger shall arrive at the age of twenty-one years; the said land, however, to be used for the benefit of the widow and all her children, subject to the conditions before mentioned. My grand-daughter Alice," the daughter of Felix, "shall be entitled to receive an

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equal portion of the negro property, when she arrives at the age of twenty-one years, or marries; the whole property to be held and kept together, for the joint benefit of the family, unless the widow should marry, and then for the benefit of the three children,' — *held*, that the fee to the lands vested in the two grandsons, Benjamin and Francis; and that Alice took no interest therein, except in the use and enjoyment as a member of the family, during the widowhood of her mother, and subsequently during her own continued minority.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 10th August, 1870, by Robert W. Banks and his wife, Mrs. Alice Clay Banks (formerly Sherrod), the daughter of Felix A. M. Sherrod, deceased, against Richard Jones, Joseph Wheeler and wife, and others; and sought a judicial construction of the will of Benjamin Sherrod, deceased, who was the grandfather of Mrs. Banks, an account, and general relief. Benjamin Sherrod died, in said county of Lawrence, in 1847; and his last will and testament was there admitted to probate soon afterwards. Said will contained a clause, the proper construction of which is the principal subject of controversy in this case, in the following words: "At the end of the year in which the payment of all the debts due by me, and chargeable to my estate, shall be completed, I will that my real and personal property, of every description, be divided as hereinafter directed; and upon such division, I devise to the family of my deceased son, Felix A. M. Sherrod, the plantation purchased of John T. Hickman, John Glass, and others, and known as the 'Pond Spring plantation'; also, all the horses, mules, cattle, sheep, hogs, plantation utensils, &c., that may be on said plantation at the time of my death, together with the following negroes (subject to the hereinafter provisions)," specifying the names of the negroes. "During the widowhood of my daughter-in-law, Sarah Sherrod, the property devised to the family of my deceased son, Felix A. M. Sherrod, shall be kept together and managed by my executors, for the benefit of herself and children; but, in the event of her marriage, she is to receive a child's part of the negroes, devised as aforesaid, together with the household and kitchen furniture, and the carriage and horses; which property shall be hers, for and during her natural life, provided the negroes are not removed from this State: in which event, she forfeits her life-estate, and my executors are to take the necessary steps to recover the property, for the use of her children by her first husband. The land devised for the benefit of the family of my deceased son, Felix A. M. Sherrod, I give to my grandsons, Benjamin and Francis Edwin Sherrod, to be equally divided between them when the youngest shall arrive at the age of twenty-one



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years; the said land, however, to be used for the benefit of the widow and all her children, subject to the conditions before mentioned. My grand-daughter, Alice Clay Sherrod, shall be entitled to receive an equal portion of the negro property, when she arrives at the age of twenty-one, or marries; the whole property to be held and kept together, for the joint benefit of the family, unless the widow should marry, and then for the benefit of the three children."

The family of Felix A. M. Sherrod, provided for in the clause of the testator's will above copied, consisted of his widow, Mrs. Sarah Sherrod, and their three children, Benjamin, Francis Edwin, and Alice Clay. Mrs. Sherrod never married again, and died in September, 1861. Benjamin Sherrod, the oldest son, who was born in 1836, died in July, 1861; and his widow married Joseph Wheeler in 1866, or 1867. Francis E. Sherrod, the youngest son of said Felix, was born on the 25th December, 1837, and died some time during the year 1863. Alice Clay Sherrod, as the bill alleged, "was born in the year 1844, and attained the age of twenty-one years in 1865; and she did not marry until the year 1869, when she was married to her co-complainant, Robert W. Banks." On the 12th of February, 1859, after said Francis E. Sherrod had attained his majority, he sold and conveyed his entire interest in the Pond Spring plantation to his brother, Benjamin Sherrod; and on the 10th December, 1860, said Benjamin Sherrod sold and conveyed an undivided half interest in said lands to Richard Jones, who was his wife's father; and said Jones afterwards purchased the other undivided interest, at a sale made by the administrator of the estate of said Benjamin Sherrod, under a decree of the Probate Court. On the division of the testator's estate, after the payment of his debts, as provided by his will, the said plantation went into the possession of Mrs. Sarah Sherrod and her children; and it seems to have been managed and cultivated for them by the executors, the guardian of the infant children, and a trustee under the appointment of the Chancery Court, until after the death of Mrs. Sarah Sherrod. Mrs. Banks claimed that she was entitled to an equal interest with her two brothers in these lands; and the bill alleged that there had never been a settlement of the trust in the lands created by the will, that Jones bought with knowledge of the trust, that the estates of both Benjamin and Francis Sherrod were and had been declared insolvent, and that the lands were chargeable with whatever balance might be found due to Mrs. Banks.

On final hearing, on pleadings and proof, the chancellor held that Mrs. Banks, under the terms of the will, took no

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interest in the lands, except the use and enjoyment thereof, as a member of the family, during the life of her mother and her own minority. He therefore dismissed the bill, and his decree is now assigned as error.

D. P. LEWIS, with E. H. FOSTER, for appellants.

THOS. H. WATTS, with J. WHEELER, *contra*.

STONE, J.—The arguments of counsel for appellants present but a single question for our investigation, and we propose to confine our decision to that one question. Does the will of Benjamin Sherrod give to Alice Clay Sherrod, now Mrs. Banks, any interest in fee, or beyond her minority, in the lands in controversy? The clause of the will which bears on this question is in the following language :

“I devise to the family of my deceased son, Felix A. M. Sherrod, the plantation purchased of John T. Hickman, John Glass, and others, known as the Pond Spring plantation” (and many slaves and other personal property not involved in this suit). “During the widowhood of my daughter-in-law, Sarah Sherrod, the property devised to the family of my deceased son, Felix A. M. Sherrod, shall be kept together and managed by my executors for the benefit of herself and children ; but, in the event of her marriage, she is to receive a child’s part of the negroes devised as aforesaid, together with the household and kitchen furniture, and the carriage and horses ; which property shall be hers for and during her natural life, provided the negroes are not removed from this State ; in which event, she forfeits her life-estate, and my executors are to take the necessary steps to recover the property for the use of her children by her first husband. The land devised for the benefit of the family of my deceased son, Felix A. M. Sherrod, I give to my grandsons, Benjamin and Francis Edwin Sherrod, to be equally divided between them when the youngest shall arrive at the age of twenty-one years ; the said land, however, to be used for the benefit of the widow and all her children, subject to the conditions before mentioned. My grand-daughter, Alice Clay Sherrod, shall be entitled to receive an equal portion of the negro property when she arrives at the age of twenty-one years or marries ; the whole property to be held and kept together for the joint benefit of the family, unless the widow should marry, and then for the benefit of the three children.”

The different clauses of the extract above given are not so reconcilable as to give to each complete and independent operation. The general intent was to give to the family of

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the deceased son, Felix A. M. Sherrod, a support, and, to this end, testator directed that the property, real and personal, "be kept together and managed by (his) executors." But this direction was not without limit in duration. It was to be during the widowed life of his daughter-in-law, Sarah Sherrod. When that ceased, either by her marriage or death, then this use, or servitude, as declared in this clause, was to cease. To hold otherwise would be to declare that the following clause is meaningless and nugatory, viz.: "The land devised for the benefit of the family of my deceased son, Felix A. M. Sherrod, I give to my grandsons, Benjamin and Francis Edwin Sherrod, to be equally divided between them when the youngest shall arrive at the age of twenty-one years." Why divide the land between the two sons, if they and their sister were to be equally interested in the fee? If it was intended that the sister was to have an equal interest with her brothers in the land, why not say so, and not leave it to be inferred from a doubtful and ambiguous clause? Why say the plantation and personal property shall be *kept together and worked* for the *benefit* of the widow and children, and then employ the strong word *give*, when the youngest son becomes of age? and, lastly, why say that "Alice Clay Sherrod shall be entitled to receive an equal portion of the *negro* property, when she arrives at the age of twenty-one years or marries," if the intention was that she should receive an equal portion of both real and personal property? We think the conclusion of the clause copied above, in reference to the division of the land, strengthens the view that the sons alone were to own the land. Its language is: "the *said* land, however, to be used for the benefit of the widow and all her children, subject to the conditions before mentioned." The conditions before mentioned were, that the widow should not marry again; for, if she did, then her right to share in the use and benefit of the land would cease. The plain meaning of this clause is, that notwithstanding the division and gift to the sons, when the youngest become of age, the family, if the mother remained unmarried and in life, was to share jointly in the use and benefit of the land. This was a use and enjoyment carved out of the fee, or made a charge upon it, if the contingency happened.

The last clause is relied on, as showing that Alice Clay was to have a permanent interest in the land. This comes immediately after the clause giving to her an equal portion of the negro property, when she arrives at the age of twenty-one years or marries, and is in the following language: "the whole property to be held and kept together for the joint benefit of the family, unless the widow should marry, and



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then for the benefit of the three children." We can not think this was intended to neutralize and destroy the two clauses of the will we have commented on above; namely, the clause which provides for the division of the land between the two sons, when the youngest should reach the age of twenty-one, and the clause which gives to Alice Clay an equal share in the slaves, when she should attain the age of twenty-one years. These clauses are clearly expressed; and to hold that the property, real and personal, was to be kept and worked together for the common benefit, for an indefinite time, would be to leave to them no operation or effect. For, why divide the land between the two sons, and why set apart an equal share of the slaves to the daughter, if no change in the use and ownership of the property was to be thereby effected?

We think this clause was inserted, merely for the purpose of carrying out the general intent of the will; namely, to provide for the common and united support of the family, so long as it remained one by the continued life and widowhood of Mrs. Sarah Sherrod, the widow of Felix A. M. Sherrod; and afterwards, during the minority of Alice Clay, should her mother die, or again marry, during that time. This construction gives operation to all the clauses, expunges none of the words of the bequest, and we adopt it as the true construction of this clause of the will.

There is no claim or proof, in this record, that the property was not kept together, and worked as the will directs, until after the death of Mrs. Sherrod, and until after Alice Clay reached the age of twenty-one years; and we hold, that whatever interest the will gave her, in the use and products of the lands, was clearly at an end at the happening of the last of those two events.

We fully concur in the views and conclusions of the chancellor, and his decree is affirmed.

## Vandeventer & Co. v. Ford & Moseley.

### *Action for Breach of Special Contract.*

1. *Relevancy of evidence, as to terms of contract.*—In an action to recover damages for the breach of a special contract, for the purchase of a fence ordered by plaintiffs for defendants, and which defendants refused to receive because it was not made altogether of iron, the fact that defendants, after their refusal to receive the fence ordered by plaintiffs, "actually purchased an iron fence, and the amount paid for it," are not relevant and admissible evidence for defendants.

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2. *When admission of irrelevant evidence is reversible error.*—The admission of irrelevant evidence, which has a tendency to mislead the jury, or to confuse and distract their minds, is an error which will work a reversal of the judgment.

3. *Charges as to sufficiency of evidence.*—In civil cases, where the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof; and a mere preponderance of the evidence, when it produces a reasonable conviction in the minds of the jury, is sufficient to sustain a verdict; but it is error to instruct the jury, as matter of law, either that they must find according to the preponderance of the evidence, or that they can not so find.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. LOUIS WYETH.

This action was brought by John D. Vandeventer and John Van Valkenburg, suing as partners, against John J. Ford and Daniel A. Moseley, to recover damages for the breach of a special contract, by the terms of which, as alleged in the complaint, the plaintiffs ordered a fence for the defendants, at their request, from the "American Fence Company," at Cleveland, Ohio; but the defendants refused to receive the fence when tendered, because it was not made altogether of iron, as they insisted it should have been. The defendants pleaded, "in short by consent," 1st, the general issue; 2d, payment; 3d, accord and satisfaction; 4th, failure of consideration; 5th, want of consideration; 6th, fraud; 7th, the statute of frauds; and issue was joined on all these pleas.

On the trial, as the bill of exceptions shows, it appeared that the contract between the parties was made by and between John D. Vandeventer, acting for the plaintiffs, and Daniel A. Moseley, acting for himself and others; and their testimony is thus stated in the bill of exceptions: "John D. Vandeventer testified, that in January, 1871, the defendants applied to his firm to procure for them a fence, with which to inclose a family burial ground; that he replied, he had the circular of the 'American Fence Company,' of Cleveland, Ohio, which contained diagrams of different styles of fences; and he thereupon produced one of said circulars for defendants' inspection, and informed them, at the same time, that said circular contained all the information he could give them on the subject of the fences, as he had never seen one of them himself. After several interviews on the subject, the witness said, defendants selected one of the diagrams or models on said circular, and directed his firm to order for defendants, from the said 'American Fence Company,' a fence of the selected model, or pattern, to inclose ground forty feet square, making one hundred and sixty feet of fencing, and agreed to pay therefor \$1.25 per foot, being the price stated under said diagram, together with all costs or

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expenses of transportation. Acting upon said instructions, plaintiffs did order from said company in Ohio a fence of the character indicated by said selected pattern, and said company shipped said fence in obedience to said order; and plaintiffs paid \$200, the price of the fence, and the costs of its transportation. But, upon the arrival of said fence, and its tender by plaintiffs to defendants, defendants absolutely refused to accept it, assigning, as a reason for their refusal, that they had ordered and expected a fence made entirely of iron; whereas the fence tendered was partly of wood, and partly of iron. Witness then said to defendants, 'Didn't I tell you, it was part wood, and part iron?' to which they replied, 'Yes, but we expected the corners only to be of wood.' Witness said, that the fence ordered was of a character to be useful only to parties specially ordering the same: 'No one wants that same fence.' Before the institution of this suit, witness testified, plaintiffs proposed to defendants, in order to avoid litigation, if defendants would pay the costs of transportation both ways, they would be willing to thus settle and compromise the matter; which proposition defendants declined to accept. The said circular was introduced in evidence by plaintiffs, and is incorporated as a part of this bill of exceptions." (But it has been detached from the transcript, and no copy of it is set out.) "A portion of the fence itself, with the iron foundation, was also produced in evidence on the part of the plaintiffs; and they testified, that it corresponded exactly with the representations, explanations, and model contained in the circular. The fence so produced was of wood, except that pieces of iron were placed over the ends of the nails [*rails?*], covering the joints or connections, and except also that the base of the fence was of iron."

"Defendants proved, by said Daniel A. Moseley, that he was acting as agent for his co-defendant, John J. Ford, and another Ford who lived in Texas, by whom he had been furnished ample means to purchase a fence for a family burial ground; and that he applied to Vandeventer & Co., and stated that they desired a fence made entirely of iron; but that the fence they ordered, and expected to receive, was to have a block of wood in its corners, and all the rest iron. Witness further stated, that the circular of the 'American Fence Company' was submitted to defendants, and that they selected one of the diagrams therein contained, as a pattern for a fence, which was, according to their understanding of the contract, to be all of iron, except the blocks of wood in the corners; and that upon the arrival of the fence ordered by plaintiffs, defendants refused to accept and pay for it,



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because it was not the fence, 'all of iron,' they expected. Witness further testified, on cross-examination, that he did not remember exactly what defendants agreed to pay for the fence, nor whether they had ordered it by the foot or by the pound; but that his best recollection was, that they were to pay within ten dollars of \$250 for the fence, including the freight charges. In the course of his examination, defendants' counsel propounded this question to said Moseley: 'State whether or not it is a fact that, subsequent to defendants' refusal to accept the fence tendered by plaintiffs, defendants actually purchased an iron fence; and if so, how much was paid by them for said iron fence?' Witness stated, in reply, that they did purchase an iron fence, with which they inclosed said cemetery; that said fence was seventy-two feet long, and they paid \$153 for it; and that it was much more tasteful and ornamental than that ordered by plaintiffs." The plaintiffs objected to this question, when propounded, "on the ground that it was irrelevant and illegal," and they reserved an exception to the overruling of their objection; but the record does not show that they objected or excepted to the answer.

There was other evidence in the case, on both sides, but it is not necessary to state it. The bill of exceptions purports to set out all the evidence. The court gave several charges to the jury, to which no exception was reserved, and gave also the following charges, at the instance of the plaintiffs: "If the jury believe that said printed circular was the basis of the contract between the parties, and that the plaintiffs were guilty of no fraud, misrepresentation, or concealment, in reference to the nature or quality of said fence, and complied with all its requirements on their part; then they are entitled to recover such damages of the defendants as they have sustained from the defendants' failure to complete their purchase." The court also gave to the jury, on the request in writing of the defendants, the following charges:

"1. That the words 'the basis of the contract,' as used in the said charge given at the request of the plaintiffs, means the contract itself; and if the jury find, from the evidence, that the contract made between the parties was for an iron fence, though of a pattern or design on the printed circular, then the plaintiffs are not entitled to recover, although the fence furnished was of the pattern selected by the defendants.

"2. That, to entitle the defendants to a verdict, it is not necessary for them to find that Vandeventer was guilty of fraud in his representations: that if the fence furnished was not the fence which the defendants contracted to buy, that fact alone entitled the defendants to a verdict.

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"3. That the plaintiffs are not entitled to recover, unless the jury find, from the evidence, that the fence they purchased was the fence which the defendants by their contract agreed to take.

"4. That before the jury are authorized to find a verdict for the plaintiffs, they must be satisfied, to a reasonable certainty, that the fence furnished was the kind of fence the defendants contracted to buy.

"5. That if there is as much evidence tending to show that the contract was not for a fence of the character furnished, as that the fence was of the character agreed to be furnished, then the plaintiffs are not entitled to recover."

The plaintiffs excepted to each of these charges, and requested the court, "as a counter charge to No. 5 given at the instance of the defendants," to give the following charge, which was in writing: "The verdict of the jury must be based upon the conviction the evidence produces on their minds; and that conviction should be produced after weighing all the evidence before them—not by deciding on the equilibrium or preponderance of evidence." The court refused to give this charge, "stating that there was no question of equilibrium in the case." The plaintiffs excepted to the refusal of the charge as asked, "and then offered to strike out the word 'equilibrium;'" but the court still refused to give the charge, and the plaintiffs excepted to its refusal.

The rulings of the court on the evidence, and in the charges given and refused, to which exceptions were reserved by the plaintiffs, are now assigned as error.

HUMES & GORDON, for appellants.—The evidence objected to was not relevant to the issues joined, and was calculated to mislead the jury, by confusing their minds as to the real issues in the case.—1 Brickell's Digest, 808, §§ 75-8; *Fail & Miles v. McRee*, 36 Ala. 61; *Crews v. Threadgill*, 35 Ala. 334; *Foster v. Chamberlain*, 41 Ala. 158; *King v. Mitchell*, at June term, 1875; *Gouge v. Roberts*, 53 N. Y. 619. The admission of this evidence is an error which will work a reversal; since the established rule is, that injury will be presumed from error, unless the record shows that no injury could have resulted.—*Frierson v. Frierson*, 21 Ala. 549; *Bilberry v. Mobley*, 21 Ala. 277; *Cox's Adm'r v. McKinney*, 32 Ala. 461; *Shields v. Henry & Mott*, 31 Ala. 53; *Buford v. Gerald*, 35 Ala. 265; *Pool v. Devers*, 30 Ala. 676; *Thomas v. DeGraffenreid*, 27 Ala. 658. The sale was by sample; and in such case, the seller undertakes only that the article fur-

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nished shall be of the quality of the sample.—*Ricks v. Dillahunty*, 8 Porter, 140; *Andrews v. Kneeland*, 6 Cowen, 354; *Bradford v. Manley*, 13 Mass. 139; 75 Penn. St. 232. The court erred, also, in the charges given and refused as to the weight and sufficiency of the evidence.—*Jarrell v. Lillie*, 40 Ala. 214; *Mays v. Williams*, 27 Ala. 272; *Acklen's Adm'r v. Hickman*, at the present term.

L. P. WALKER, *contra*.

STONE, J.—We feel bound to reverse this case. The fact that defendants, after they refused to receive the fence ordered for them by plaintiffs, ‘actually purchased an iron fence,’ and the amount paid for such fence, were wholly irrelevant to the issues on trial in this cause. Their tendency was, at least, to confuse and distract the minds of the jurors, if not to mislead them.—*Crews v. Threudgill*, 35 Ala. 334; *Storey v. Union Bank*, 34 Ala. 687; *Tanner v. Louisville and Nashville Railroad*, at the present term; *Sayre v. Durwood*, 35 Ala. 247; 1 Brick. Dig. 808. See, also, authorities on brief of appellant.

The charge asked by plaintiffs, though copied substantially from the opinion in *Jarrell v. Lillie*, 40 Ala. 274, was rightly refused. It was calculated to mislead the jury, by a confusion of terms. The rules, deducible from the various rulings of this court, which should govern the jury in weighing evidence in civil causes, may be summarized as follows: If the testimony be evenly balanced, or in equilibrium, which is the same thing, then the verdict must be against the party on whom the burden of proof rests.—*Lindsey v. Perry*, 1 Ala. 203; *Jarrell v. Lillie*, 40 Ala. 271. A charge, asserting that the jury must find according to the preponderance of the evidence, is erroneous, because that preponderance may not convince the minds of the jury.—*Mays v. Williams*, 27 Ala. 267. So, a charge that a jury can not find a verdict on the preponderance of evidence, would be equally erroneous; for the preponderance of evidence might satisfy the minds of the jury. We can not clearly comprehend how evidence can be *weighed*, without considering its *equilibrium*, or *preponderance*. That is implied in the mental process of weighing. The true measure, or weight of proof, to justify a verdict based upon it, is, that it shall reasonably convince, or satisfy the minds of the jury, that the fact exists. This conviction, or satisfied mind, may rest on a preponderance of evidence, if that preponderance produces reasonable conviction of the mind. But, while preponderance, or tendency of the evidence, may produce conviction, it does not neces-



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sarily do so; and it is error to instruct the jury, as matter of law, that either one or both requires the jury to base their verdict upon it. It may convince them, and they may find their verdict upon it. It does not necessarily do so; and if it does not, as matter of fact, convince their minds, they should not find their verdict upon it.—1 Brickell's Dig. 335, § 5; *Ib.* 337, § 20.

We do not assent to the proposition that, in this case, the 'basis of the contract,' is the contract itself.

Reversed and remanded.

BRICKELL, C. J., not sitting, having been of counsel.

## Ogbourne v. Ogbourne's Adm'r.

*Petition by Widow for Exempt Property in Husband's Estate.*

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1. *Widow's statutory quarantine.*—The widow's statutory quarantine, or right to retain possession of the dwelling-house in which her husband most usually resided, with the buildings appurtenant thereto, "and the plantation connected therewith," free from the payment of rent, until her dower is assigned her (Code of 1876, § 2238), does not extend to a plantation situated several miles distant from the residence in town, and occupied by a tenant under a contract of renting.

2. *Repealing statutes.*—A clause in a statute, repealing "all laws and parts of laws contravening this act," is only a legislative declaration of its necessary effect, and does not add to its repealing force; but, when a statute is a revision of existing statutes on the same subject, and shows on its face that it was intended to operate as the only law on the subject, it necessarily repeals all existing statutes, without express words of repeal.

3. *Exemptions for benefit of decedent's widow and children.*—The act approved February 8, 1872, entitled "An act to exempt from administration property of decedents, and vest titles in the widow or child or children" (Session Acts 1871-2, p. 91), does not create cumulative or additional exemptions to those allowed by the existing statutes (Rev. Code, §§ 2061-2), but was intended as a substitute for those sections, and necessarily repeals them.

APPEAL from the Probate Court of Montgomery.

In the matter of the estate of William H. Ogbourne, deceased, on the petition of Mrs. Susan V. Ogbourne, his widow, praying that the administrator be decreed to pay and deliver to her certain personal property of the estate, which she claimed as exempt from administration. The decedent died, intestate, in July, 1872; and letters of administration on his estate were granted by the Probate Court of said county, in January, 1873, to W. T. Hatchett, the general administrator of the county. The petition of the widow was

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filed on the 1st December, 1874, and alleged that said decedent left no children surviving him; that he owned, at the time of his death, "a lot of household furniture, worth about \$250, an old buggy, of the value of \$30, a new buggy, of the value of \$100, and a blind mule, of the value of \$30;" that she had retained this property, claiming it as exempt to her, and was willing to account for it, on settlement with the administrator; that she was entitled to \$1,000 worth of the personal property of the estate, which the administrator had received, consisting of property appraised at \$78, and the proceeds of the sale of certain county bonds; and she prayed that the administrator be required to deliver the said property to her, and to pay the money to her. An answer to the petition was filed by the administrator, alleging that the widow was not entitled to claim any exemption of personal property in the estate of her deceased husband, because, at the time of his death, she was possessed of a statutory separate estate of greater value than the exemptions allowed by law; insisting that, if entitled to any exemptions at all, she was not entitled to the articles specifically enumerated in the statute, and one thousand dollars besides; and alleging that she had already received more than she was entitled to have, and still retained it.

"It was in evidence that W. H. Ogbourne, when he died, owned the house and lot in the city of Montgomery on which he then resided, which was of the value of about \$3,500, but was incumbered with a mortgage for about \$800; that he also owned a tract of land containing about one hundred and forty acres, most of which was cleared, and in cultivation that year (1872) by a tenant, a colored man named Allen, to whom deceased had rented it, with two mules and farming implements, for the price of \$300. The value of this tract of land was about \$1,500. It was situated about five miles from the city of Montgomery. The life of the deceased had been insured for the benefit of his wife, and the petitioner realized on the policy, soon after her husband's death, about \$14,000. She had no other separate estate than this. The estate of the deceased was insolvent. The house and lot, and the tract of land, were sold by the administrator, under the order of this court, subject to the petitioner's claim for dower and exemption therein; and by agreement between her and the administrator, she bid \$1,750 at the sale; and there being no other bid, she became the purchaser at that price, and paid the money to the administrator. There was no agreement between her and the administrator, as to any thing else than that she should bid that sum at the said sale. In August, or September, 1862, the petitioner went to the

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tract of land in the country, and applied to said Allen, the tenant in possession, to know which of the mules was the best one, saying that she was entitled to one mule as exempt, and wanted the best one. Allen told her that '*Queen*' was the best mule, and she then said, 'Then, I will take *Queen*, and the other one, *Rhoda*, is the estate's;' but she did not take the mule out of Allen's possession, and exercised no act of ownership over it. Before the end of the rental year, *Queen* was stolen; and afterwards, after the expiration of Allen's tenancy, the petitioner took *Rhoda* as the mule exempted to her under the Code. Said Allen testified, that *Queen* was worth \$160, and *Rhoda* \$125, and that *Rhoda* was permanently lame. At the end of the year 1872, the petitioner received \$300 from said Allen, as rent for the land, mules, &c., under the contract between him and the deceased. It was admitted by the petitioner, that the new buggy taken by her was worth \$125, the old one \$30, and the plantation utensils \$78. James A. Farley testified, that the mule *Rhoda* was worth only \$75; and he produced a note for that amount, for which he had sold her a few days after the petitioner had gotten her into possession.

"Upon this evidence, the administrator asked the court to decree, that the petitioner was not entitled to any exemption, because the testimony showed that she owned a separate estate at the death of the deceased, of greater value than the exemptions allowed by law; but the court refused so to decree, and the administrator excepted. The administrator then asked the court to decree, that the petitioner be charged with the value of the mule *Rhoda*, on the ground that the facts in proof showed an election by her to take said mule as part of the property exempted to her; but the court refused so to decree, and the administrator excepted. Upon this proof, the petitioner insisted, that she was entitled to the household and kitchen furniture set forth in her affidavit," the estimated value being \$140.25, "exclusive of the \$1,000 exempted by the act of February 8, 1872; which the court refused to allow, and the petitioner excepted. The petitioner insisted that, under and by virtue of said act of February 8, 1872, she was entitled to property or money of the value of \$1,000, exclusive of the exemptions allowed by the Code; which the court refused to allow, and the petitioner excepted. The petitioner claimed, also, that the \$300 rent received by her was in right of her quarantine, and should not be charged against her; which the court refused to allow, and the petitioner excepted. The petitioner further insisted, that she had no separate estate during the life of her husband, and that the facts did not disclose such a separate estate as de-



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barred her of dower under the laws of Alabama; which the court refused to allow, and the petitioner excepted."

The appeal is sued out by the widow, and the several rulings to which she reserved exceptions, as above stated, are now assigned as error.

J. T. HOLTZCLAW, for appellant.

E. J. FITZPATRICK, *contra*.

BRICKELL, C. J.—It is the law of this State, that the widow's quarantine does not extend beyond the right to occupy or retain the dwelling-house, where her husband most usually resided next before his death, with the offices and buildings appurtenant thereto, and the plantation connected therewith, until dower is assigned.—R. C. § 1630. When, as in this case, the husband, at his death, had his residence in a town or city, owning a plantation situate in the country, several miles distant, in the occupancy of a tenant, under a contract of renting, such plantation is not, within the meaning of the statute, connected with the dwelling-house, and the widow cannot claim the rents thereof, as accruing to her, because of her quarantine.—*Weaver v. Crenshaw*, 6 Ala. 873; *Smith v. Smith*, 13 Ala. 329; *McAllister v. McAllister*, 37 Ala. 484; *Clary v. Sanders*, 43 Ala. 287. Without inquiring whether the Court of Probate has jurisdiction to allow the widow compensation for the detention of her quarantine, in any case, it is enough to say, the appellant had not the right of quarantine in the plantation, the rents of which she collected. This was the ruling of the Court of Probate.

2. The remaining question is, whether the provisions of the Code regulating the exemptions of personal property of decedents, to the widow and minor children (R. C. §§ 2061-2), are repealed by the act of February 8, 1872, entitled "An act to exempt from administration property of decedents, and vest titles in the widow, or child or children" (Pamph. Acts 1871-2, p. 91); or, whether the exemptions allowed by the last named statute, are cumulative to the exemptions the Code allows.

The repealing clause of the act of 1872 is general—of "all laws and parts of laws contravening this act;" and it does not operate a repeal of an existing statute, relating to the same subject-matter, not in conflict with the provisions of the act.—*People v. Durick*, 20 Cal. 94. It is merely a legislative declaration of the necessary effect of the act, if the clause had not been inserted. Subsequent statutes, not in-

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consistent with, or repugnant to former statutes, are not a repeal of the former, unless it is clear the subsequent statute was intended to prescribe the only rule which should govern the subject.—*Sedgwick on Stat. & Con. Law*, 97-104; *Daviess v. Fairbairn*, 3 How. 636; *Sacramento v. Bird*, 15 Cal. 294; *Serann v. Buck*, 40 Miss. 268; *Johnston's Estate*, 33 Penn. 511. A subsequent statute, revising the subject-matter of the former statute, and evidently intended as a substitute for it, in the language of the Supreme Court of Massachusetts, "although it may not contain express words of repeal, will, on principles of law, as well as in reason and common sense, so operate."—*Bartlett v. King*, 12 Mass. 345; *Wakefield v. Phelps*, 37 N. H. 304; *Towle v. Manett*, 3 Greenl. 22; *Lewis v. Stout*, 22 Wisc. 234.

3. Under the provision of the Code, the exemption to the widow and minor children was matter of right, whether the husband and father died testate or intestate; the act of 1872 limits the exemption to the widow, or minor children, of intestates. The Code confers the right on the widow and minor child or children jointly; the statute of 1872 confers the right on the widow, if there be one, to the exclusion of the minor children, who take only in the alternative that there is no widow to take. The Code enumerates specific personal property as exempt, and if the decedent had not that property, there was no exemption, though he died possessed of a large and valuable personal property, and his family were reduced to destitution. The act of 1872 confers an exemption, not of specific property, limiting it only to value—not exceeding one thousand dollars, and it may be either of money or property. In other respects, the provisions of this act, and of the Code, are so variant, that the two can consist only by regarding the act of 1872 as cumulative, creating an additional exemption, or as a substitute for the Code, prescribing the only rule which shall control as to the exemptions of the personal property of decedents. The latter is its proper construction, manifestly. The title of the statute is indicative of this construction: "An act to exempt from administration property of decedents, and vest titles in the widow or child or children." A comparison of its provisions with the provisions of the Code shows clearly that the purpose of the legislature in its enactment was to prescribe a new and only rule on this subject. It operates a repeal of the provisions of the Code; and at the death of appellant's husband, when her right accrued, was the law creating and defining it.

The Court of Probate did not err in so ruling, and its judgment is affirmed.

[Tanner's Executor v. Louisville &amp; Nashville Railroad Co.]

## Tanner's Executor v. Louisville & Nashville Railroad Co.

### Action for Damages against Railroad Company for Killing Plaintiff's Testator.

1. *Care and diligence required of railroad company.*—In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence—that degree of diligence which very careful and prudent men exercise in the conduct of their own affairs; and this requires that they shall employ very careful and prudent men, and that the persons employed by them shall exercise such care and diligence as very careful and prudent men exercise in the conduct of their own private interests and important enterprises.

2. *Contributory negligence.*—The doctrine of contributory negligence, as a defense to an action for damages on account of injuries caused by a careless or tortious act, has been materially modified, in its application to actions against railroad companies: although the plaintiff may have been at fault in the first instance, in getting on the railroad track, and thus placing himself in a position of peril, yet, if he makes all proper efforts to escape when the danger becomes apparent, and the servants of the railroad company fail to use all the proper means in their power by which the danger might be avoided, the railroad company is responsible for the injury, and the original contributory negligence is no defense to the action.

3. *Same.*—To avoid the defense of contributory negligence, it is not necessary that the wrongful act of the defendant, or its agents and servants, should be "wanton and intentional," as erroneously stated in the case of *Government St. Railroad Co. v. Hanlon*, 53 Ala. 70: if the injury done be wanton, reckless, or intentional, that defense is overcome.

4. *Same.*—When a person of adult years is seen on a railroad track, in advance of an approaching train, and shows by his actions that he is aware of its approach, and is using the proper efforts to get out of its way, the person in charge of the train is not required to stop it, nor, ordinarily, even to check its speed; but, if the person be on horseback, on a high embankment, or in a deep cut, from which he probably cannot escape in time, or be suddenly thrown from his horse, and cannot escape, it is the duty of the engineer promptly to use all means in his power to avoid injury, and the company is liable if he fails to do so.

5. *Admissibility of declarations as part of res gestæ.*—The declarations of the servants of the railroad company, while returning to town on the train with the dead body of the deceased, are not admissible evidence against the company, as a part of the *res gestæ* connected with the killing.

6. *Relevancy of evidence, on question of negligence.*—In an action against a railroad company, to recover damages for killing plaintiff's testator while riding on the track, on horseback, the defendant cannot be allowed to prove "that there was danger to employees on the train in running over stock;" nor that other persons had been notified not to travel on the railroad track.

7. *What witness may state.*—The engineer, in charge of the train at the time the accident happened, cannot be allowed to testify that he used "all the means he had to stop the train," but should state what means he did use.

8. *Same.*—So, he can not be asked, "whether the ground and bearing of the road-bed were such as would have permitted the deceased to escape injury by the locomotive and cars, but for his own conduct," &c.

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| 58         | 599 |
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| 62         | 76  |
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| 63         | 277 |
| 65         | 78  |
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| 72         | 454 |
| 75         | 118 |
| 75         | 524 |
| 78         | 175 |
| 79         | 229 |
| 79         | 311 |
| 80         | 128 |
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| 81         | 197 |
| 84         | 150 |
| 84         | 153 |
| 84         | 172 |
| 85         | 485 |
| 87         | 616 |
| 89         | 245 |
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| 89         | 316 |
| 89         | 317 |
| 90         | 69  |
| 90         | 109 |
| 91         | 493 |
| 92         | 271 |
| 60         | 621 |
| 93         | 210 |
| 93         | 421 |



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9. *Cross-examination of witness.*—The servants of the railroad company, who were employed on the train at the time plaintiff's intestate was killed, having been examined as witnesses for the company, they may be questioned, on cross-examination, as to their statements and declarations relative to the accident, made a day or two after it happened ; such questions are certainly permissible, as laying a predicate for proof of contradictory statements, even if they exceed the large latitude which is allowed in the cross-examination of witnesses.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. W. B. WOOD.

This action was brought by Samuel Tanner, as the executor of the last will and testament of Peterson Tanner, deceased, against the Louisville & Nashville Railroad Company, to recover damages for the alleged wrongful act and negligence of the defendant's agents and servants, by means whereof, in September, 1872, plaintiff's testator was run over and killed by an engine and train of cars ; and was commenced on the 29th August, 1873. The defendant pleaded, 1st, not guilty ; 2d, that the death of plaintiff's testator "was not produced by any negligence of this defendant, nor by any act, omission, or culpable negligence of any engineer, or other officer employed, or agent of defendant, nor by any act or omission of this defendant, or of any person for whose act or omission this defendant was or is liable, or whose act or omission was authorized by this defendant ;" and, 3d, "that the injury to and death of said Peterson Tanner, in said complaint complained of, would not have occurred without his fault or negligence, and that his fault and negligence, above in this plea referred to, contributed to produce the said injury to and death of said Peterson Tanner." The plaintiff demurred to the second and third pleas, assigning as ground of demurrer to the third, "that mere negligence on the part of plaintiff's testator would not relieve defendant of responsibility in this action." A memorandum of the clerk, and the bill of exceptions, each states that the demurrer was overruled, and that issue was then joined on all the pleas ; but the judgment-entry does not show any of the rulings of the court on the pleadings, only reciting that the cause was tried on issue joined.

The bill of exceptions purports to set out all the evidence adduced on the trial, including the depositions of six or eight witnesses, agents and servants of the railroad company, to whom numerous interrogatories were propounded by each party, numbering from fifteen or twenty to more than one hundred each ; and more than forty exceptions were reserved by the plaintiff to the rulings of the court on questions of evidence. The opinion of this court renders it unnecessary to give a detailed statement of the evidence, or even of most of

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the rulings to which exceptions were reserved. It appeared that the deceased, on the morning of the day on which he was killed, left his store in the town of Athens, on horseback, for the purpose of examining and marking some cross-ties, which he and his partner were delivering to the railroad company, at different points along the track, by contract between them and the company. He was riding on the track, about eight o'clock in the morning, near a crossing called the "Canada Crossing," when a train approached, consisting of an engine, tender, and one caboose car, coming from the direction of Athens; and he continued on the track, looking back at the train, and increasing the speed of his horse, until within fifty yards of the crossing, near or at the mouth of the cut in which he was, when his horse became unmanageable, and threw him, on or near the side of the track, in front of the engine, and he was run over and injured, and died two days thereafter. The only eye-witnesses of the accident were the persons on the train, servants of the railroad company, whose depositions were taken by the defendant.

Albert Hollopeter thus testified: "The freight train on which I was a brakeman, engine No. 316, was coming north from Decatur, about one and a half or two miles north of Athens, some day in September, 1862, (I forget the day,) between seven and eight o'clock A. M., when a man was thrown from his horse, and fell near the railroad track; and two or three of his fingers were cut off by our train. That was all the damage done him by the train. I did not know his name, but was told afterwards that his name was Peterson Tanner. I was on the engine, and saw him riding on the track, several hundred yards ahead of us. As soon as the engineer could have seen him, he did see him, and immediately blew the alarm whistle, and the fireman rang the bell. Mr. Tanner was on horseback, and heard us coming; and he would ride a little piece, look back at us, and then spur up his horse a little faster. He kept this up some little time. As soon as we saw him, the engineer shut off the steam, and called for brakes; and when we got within seventy-five, or one hundred yards, the engineer reversed his engine." "He was riding in the middle of the track, when we first saw him; and he continued there until we got pretty close on to him, when he was turning off the track. He was off, on the side of the road-bed, when he received the injury, outside of the rails. He was thrown from his horse, just before we got up to him. He was thrown on his back, with his arms stretched out, and was lying rather alongside the track. When first seen by us, he was several hundred yards ahead of us, on the track, moving at a moderate rate of speed, say five or six



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miles per hour. He did not leave the track. He was several hundred yards off, when first observed by me. The line of the road is straight, and continued so until beyond the point of the accident." [The train was moving] "about twelve miles per hour; was running very slow when he was hurt, say two miles per hour; running slower and slower all the time, trying to stop the train; and the train was stopped about thirty or forty feet from the point at which the accident occurred." "He seemed to pay some attention to our train; he would turn around occasionally, and look at us. I was on the tank of the engine, looking at him. He made no attempt or effort to leave the track, until we were almost upon him. He then seemed to make an effort to get off the track, but his horse became frightened, and threw him. He could have got off [the track] easy enough, if it had not been for his horse becoming unmanageable. It was on level ground; no embankment or hill prevented him from getting off. He had ample notice and time to get off before his horse became frightened; and then there was nothing but the frightened condition of his horse which prevented his escape. After being thrown, he fell near the side of the track, and lay there until the cars came along. He was injured by the fall from his horse, and was lying there blowing blood out of his mouth. He made no attempt to get out of the way of the approaching train. I should say that he was insensible. I was looking at him as we approached where he lay, and had a clear view of him. The horse ran off into the woods, and was not struck or injured at all."

John L. Brown, the engineer of the train, testified: "In coming from Athens, Alabama, on the morning of September 2d, I think it was, 1862, my engine, No. 316, ran against a man. I did not know his name, but learned for the first time, when we brought him into Athens, that his name was Peterson Tanner. When about one and a half miles north of Athens, and running about twelve miles per hour, I saw a man on horseback, about one mile ahead of me, going north, straight up the track. I blew the cattle whistle, to make him get off the track; but he seemed to pay no attention to it. I continued to blow, until we had got within about one hundred yards of him, and still he did not get off. I then called for brakes, and reversed the engine, and tried every means to stop the train. When we got pretty close up to him, he seemed to try to turn off the track; but his horse became unmanageable, and threw him on the side of the track, just before we got to him. He seemed to be stunned, so that he could not get out of the way, and made no effort to do so." "When I first saw him, he was riding on the



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track between the rails, and going at a slow rate of speed; and he did not leave the track after I saw him. He was about a mile from me, I suppose. The line was straight where I first saw him, and was the same where the accident occurred, and so was the intermediate space. We were running about twelve miles per hour when I first saw him, and were running very slowly—had almost stopped—when the accident happened. I first blew the alarm whistle, for a mile before I got to him, to make him get off the track. When within one hundred yards of him, the bell was rung for the same purpose; and then the brakes were applied, the engine reversed, and steam applied, to stop the train more readily." "I don't know what he was doing on the track, nor why he should have stayed there so long after he was warned off. There was nothing to prevent him from getting off. He could have gotten off easily, if it had not been for his unmanageable horse. It was upon a level piece of ground; no cut or embankment in his way."

Rufus Crenshaw, the conductor of the train, testified: "When about one and a half miles north of Athens, I discovered a man on horseback, riding in the middle of the track. The bell was immediately rung by the fireman, and the engineer commenced sounding the whistle, as for cattle alarm. The train was running at a speed of twelve miles per hour. The man was riding at a slow gait, and apparently made no attempt to get off the track, out of the way of the train. The whistle was sounded incessantly. When the train was within about seventy-five yards of the man, the whistle was sounded to put on brakes, and I saw them applied. After running within about twenty-five yards of the man, he then apparently made his first attempt to get off the track; but the horse, becoming frightened at the sound of the whistle, became unmanageable, and, rearing upon his hind feet, threw the man on the iron rail, inflicting a severe cut on the side of his head. The pilot of the engine struck him, before he could recover himself from the fall, and one hand was run over by the wheel. After striking the man, the train, which consisted of engine and caboose, ran about forty feet, and stopped. Myself, engineer, and crew, then picked up the man, placed him in the caboose, and returned to Athens. The horse Mr. Tanner was riding got out of the way, and was not injured by the train. The place where the accident occurred was on straight and level ground, and the location on either side of the track, at this point, is very favorable for getting out of the way of passing trains."

The depositions of these witnesses were taken by the defendant, but that of Crenshaw was read in evidence by the

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plaintiff, the defendant declining to read it. Among the interrogatories propounded to them by the defendant, were the following: 15th. "State whether all the means in your power, known to skillful engineers, such as the application of brakes, and the reversal of the engine, in order to stop the train, were used and applied by you and the other servants and employees on said train, before Mr. Tanner was struck by the locomotive and cars of the said train." 22d. "State whether he could have gotten off, and avoided being struck, but for being prevented as stated by you. Describe the ground at the place where he was thrown from his horse, and struck by the engine. Was it upon a level, cut, or embankment, at which he was injured? Was the ground and the bearings of the road-bed such as would have allowed or permitted him to escape injury or hurt by the locomotive and cars, but for his own acts, conduct, and doings?" The plaintiff objected to the said 15th interrogatory, "because it is illegal, and seeks illegal evidence; because it is leading; because it suggests the answer desired; because it seeks a conclusion of facts, and not the facts themselves, and because it seeks a conclusion of law;" and he made the same objections to the latter part of the 21st interrogatory. The court overruled these objections, and the plaintiff excepted. Several cross-interrogatories were propounded to these witnesses on the part of the plaintiff, substantially like the following: "64. Did you not say to, or in the presence of W. B. Vaughan and W. Russell, at the depot in Athens, the day of the occurrence, or a day or two after it, that you were on the engine at the time Mr. Tanner was struck by the train, and that you, or 'we,' referring to those who had control and management of the running of the train, saw the man on the track some time before you (or 'we') got to him, but thought he was a boy trying to see how long he could remain on the track, and you (or 'we') thought you (or 'we') were going to have a nice race, and for that reason did not blow the whistle," &c. On objection by the defendant, the court suppressed this, and all similar interrogatories, with their answers; to which rulings exceptions were reserved by the plaintiff.

On the part of the plaintiff evidence was adduced, contradicting the testimony of these witnesses, as to the ringing of the bell and other signals and precautions used by them, and the nature of the ground at the place of the accident; but the opinion of this court does not require a statement of all the evidence on these controverted points, and a partial statement would not be correct. Mahala Mastin, a negro woman, who lived near the scene of the accident, and, hear-



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ing the alarm signals, hastened to the road to see what was the matter, was examined as a witness for the plaintiff, and testified that, as the train passed her, returning to Athens after the accident, "she saw a man lying on the floor of the car, seemingly dead; that he was picked up at the north end of the cut, and the train passed her a few minutes afterwards, some of the men standing in the door of the caboose. Plaintiff asked said witness, whether the train hands, or any of them, as they passed, said anything to her, and what? To this question defendant objected, and the court sustained the objection; to which plaintiff excepted. Plaintiff then asked said witness, what was the conduct of the officers and servants on the train, when they passed her? To this question, also, the defendant objected, and the court sustained the objection; to which the plaintiff excepted. Plaintiff then proposed to prove, by said witness, that the men on the train, as it passed her, were laughing and jesting at her, and threatening to jump out and hit her, and other levituous conduct; to which evidence defendant objected, and the objection was sustained; and plaintiff excepted."

The court allowed several witnesses, agents of the railroad company, to testify on the part of the defendant, against the objections of the plaintiff, that they had warned and notified persons not to walk or travel on the railroad track, as it was forbidden by the company and by law; and some witnesses testified that they had been so notified, but no notice to the plaintiff's testator was proved. The plaintiff reserved exceptions to the admission of this evidence. One Harahan, a witness for the defendant, who was road-master, and testified as to the condition of the road and other matters, was asked by the defendant, "if there was any danger, and what, to the employees and train, in running over stock;" and answered, "that there was the danger of the train being thrown from the track and wrecked." To this question and answer, each, the plaintiff objected, and excepted to their allowance.

Upon all the evidence adduced, the court charged the jury—

"1. A railroad company is the absolute owner of its track, and has the right to its free and unmolested use; and between stations and public crossings, the track belongs exclusively to the railroad company, and all persons who walk or ride thereon, without the permission or authority of the company, are guilty of negligence, and they take the risk of the consequences upon themselves; provided the company, in running their locomotive and cars, use ordinary care and diligence to prevent injury to persons who may casually be on the track. In towns, and at public crossings, they are re-



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quired to give the usual signals, of ringing the bell, or blowing the whistle; but, in passing along the road in the country, not near a public crossing, no such signals are required, but only ordinary care and diligence, by keeping a proper lookout, to see whether there is anything on the track; and on perceiving anything on the track, the engineer should use all means in his power, known to skillful engineers, such as the application of brakes, and reversal of the engine, in order to stop the train, or, at least, to have it within his control, when there is sufficient time and space to do so.

"2. Whenever there is such negligence, on the part of the person injured, as essentially contributes, directly, or as a proximate cause, to the occurrence from which the injury arises, amounting to the want of ordinary care on his part, such negligence will prevent the plaintiff from a recovery of damages, unless it is shown that the act which caused the injury was wanton and intentional.

"3. If you find, from the evidence, that the person in charge of the locomotive and train was using ordinary care and diligence in running the engine, and that Tanner was injured because of his own negligence, then the defendant is not liable for damages. But, if you find from the evidence that ordinary care and diligence were not used by the engineer, or other person running the engine, and that the injury to Tanner was caused wantonly and intentionally, then, although Tanner may have been guilty of negligence in going on the track, the plaintiff may recover damages.

"4. The question for the jury to determine from the evidence is, whether Peterson Tanner, by being on the railroad track, at the time, in the place, in the manner, and under the circumstances as developed by the testimony, was guilty of such negligence as contributed to his death; whether the railroad, by its officers or agents, was using ordinary care and diligence in the running of its engine. If so, the plaintiff cannot recover. Or, whether his death was caused by the want of due and proper care of the parties in charge of the locomotive or train, without such negligence on the part of Tanner as essentially contributed to his death; and in the latter case, he is entitled to recover.

"5. The jury must look at the testimony—to all the circumstances connected with the injury—the time, the place, the situation of the parties, the rights and duties of the parties, the relative degrees of care used by each, or the want of it, and all the surroundings, and the conduct of the parties—to determine the question of negligence in one or both of the parties; and if, under the principles of law which I have given you in charge, you find for the plaintiff, you

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will assess his damages at what the proof shows he is entitled to have, not exceeding three years' income of the deceased, and not more than three thousand dollars; but, if you find for the defendant, you will say, 'We, the jury, find for the defendant.'"

The court charged the jury, also, at the request of the plaintiff in writing, as follows:

"1. Where a railroad company, by itself or agents, is a wrong-doer, it is responsible for all the consequences which flow immediately from its wrongful or negligent act; and the responsibility is not relieved by the fact, that the consequences of the injurious act could have been prevented by the care or skill of the injured party.

"2. If the defendant permitted the public, in the neighborhood in which Mr. Tanner lived, and when and where he was killed, to ride and walk on its track, and people were in the habit of doing so, and Mr. Tanner had no notice not to do so; then this is a circumstance to be considered by the jury, in determining whether Mr. Tanner was negligent in going upon the track at such a place.

"3. The character of Mr. Tanner, for prudence and caution, is a circumstance to be looked to, to determine whether he was negligent at the time of the injury.

"4. If the agents of the defendant could have prevented the injury, by the use of ordinary care and prudence, it was their duty to do it, even if the injured party acted with carelessness and incaution."

The court refused the following charges, which were asked by the plaintiff in writing:

"1. If the agents of the defendant did not, on perceiving Mr. Tanner, apply the brakes, and reverse the engine, and use all means in their power, known to skillful engineers, to stop the train; and they saw, or could have seen Mr. Tanner, in sufficient time to have stopped the train before it got to him; then, if Mr. Tanner was injured by the train directly, or by his horse, which was run up to and frightened by the train, then the defendant is liable.

"2. The injured party is not chargeable with negligence, in riding a short distance along on a railroad track, at a point over which the people generally had been in the habit of walking and riding for many years before; and there is no evidence of dissent on the part of the railroad company, except a notice thereof to two or three men in the neighborhood, given several years before, and not communicated to the injured party; and there is no schedule train due for several hours; and the injured party made every effort he

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could to get off, as soon as he saw or heard a special train approaching.

"3. The agents of the defendant, on perceiving an obstruction on the track, ahead of a train which they are running, must put on the brakes, and reverse the engine, and use all other means in their power to stop, if such were practicable and available; and if they fail to do these things, and injury result, the defendant is liable."

The court charged the jury, also, at the request of the defendant in writing:

1. "The plaintiff can not recover, under his complaint in this case, unless you believe, from the whole evidence, that the death of Peterson Tanner was caused by some wrongful act, or omission, or culpable negligence, of an officer or agent of the defendant, which is alleged in the complaint; and if said Peterson Tanner was guilty of fault or negligence, contributing to the injury, and that without such fault or negligence on his part he would not have been injured, the jury ought to find a verdict for the defendant.

2. "If the plaintiff's testator, Peterson Tanner, was on horseback, riding on the railroad track of the defendant, between a station and public crossing, he was subject to all the risk incident to such an undertaking, and was bound to use his eyes and ears, as far as there was opportunity to discover and avoid danger; and if, by such use of his senses, he might have discovered and avoided danger, but omitted to do so, and if such omission on his part contributed to produce the injury complained of in this case; and if, without such omission on his part, the injury would not have occurred, then, upon this state of facts, the plaintiff is not entitled to a verdict.

3. "If said Peterson Tanner was riding on a horse, on the railroad track of the defendant, between a station and a public crossing, and was apprised of the approach of the train, by the noise, in time, and with opportunity to have avoided injury to him, by dismounting from his horse, or otherwise; and if, after being so apprised of the approach of the train, he ventured to remain on his horse, and on the track, from a miscalculation of his danger, the error was his, and the defendant is not answerable for that erroneous calculation.

4. "If the evidence as to the question, 'What caused the death of said Peterson Tanner,' is so precisely balanced that it is impossible for the jury to believe and say on which side of that question the weight and preponderance of the evidence is; then, under this state of the evidence, the jury ought to find a verdict for the defendant,



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5. "If, after weighing all the evidence, and after ascertaining what mistakes, if any, have been made by any and every witness, and throwing aside all testimony founded in mistake, the jury believe, from the evidence which they believe free from mistake, that any one of the three pleas filed by the defendant is true in substance, they ought to find a verdict for the defendant.

6. "A railroad company has a right to the free and uninterrupted use and enjoyment of its railroad; and a man who willfully and negligently interferes with its right, and thereby brings injury upon himself, must suffer the consequences of his own neglect or folly.

7. "A man who essentially contributes, by his own misconduct or negligence, amounting to want of ordinary care, to produce any injury, can not recover of a wrong-doer, whose act was not wanton and intentional."

The plaintiff excepted to each of the charges given by the court, and to the refusal of each of the charges asked by him.

The rulings of the court on the pleadings and evidence, and the several charges given and refused, to which exceptions were reserved, are now assigned as error, making in all sixty assignments of error.

McCLELLAN & McCLELLAN, for appellant.—1. The third plea is certainly bad, and the demurrer to it ought to have been sustained. The facts set up in it would constitute no defense at common law, and much less under the statutes of Alabama. At common law, the fault and negligence of the plaintiff, to bar a recovery by him, must have been the direct and immediate cause of the injury: and even then, if the defendant could have prevented the accident by the use of ordinary care and diligence, the plaintiff could recover.—*Pharis & Herndon v. Stewart*, 9 Porter, 336; *Steamboat Farmer v. McCraw*, 26 Ala. 189; *Grant v. Moseley*, 29 Ala. 302; 45 Mo. 255, 322; 48 Illinois, 221; 49 Illinois, 490; 38 Illinois, 370; 43 Miss. 233; 24 Geo. 75; 27 Geo. 113; 2 Amer. 517. Besides, the plea entirely ignores the statutes of Alabama, and dispenses with a compliance on the part of the defendant with any of their provisions.—Rev. Code, §§ 1399-1401.

2. The testimony of Mahala Mastin, as offered, was competent evidence against the defendant. In the first place, this evidence was the conduct and declarations of the defendant's agents and servants, in the performance and prosecution of its business; and it was admissible against the defendant on that ground.—1 Greenl. Ev. §§ 113-15; 48 Ala. 15. They were bound by the obligations of law and hu-

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manity to carry the wounded man where he could receive proper medical care and attention; and if they had failed to discharge this duty, and death had ensued for the want of such care and attention, the liability of their principal cannot be denied.—29 Maryland, 420. In the next place, the evidence was admissible, as a part of the *res gestæ*: it sprung out of the main fact—that is, the killing—was inseparably connected with it, and served to elucidate and explain it.—*Gandy v. Humphries*, 35 Ala. 617. The rule of evidence, in such cases, necessarily includes all the attendant circumstances and surroundings of the main fact; and the cry and clamor of the mob in pursuit, and their acts and utterances in returning, are equally within the rule. Besides, the unseemly and inhuman conduct of these men, on such an occasion, would go far to establish their unfitness for the positions in which they were placed by the defendant, and to justify the inference by the jury that the injury was willfully and wantonly inflicted by them.

3. The court erred, also, in allowing leading questions to be put to the witnesses, and in allowing them to state their opinions and conclusions, as shown by the several specific exceptions which were reserved. Whether the deceased could have escaped; whether he had ample time to get off the track, if he desired to do so; whether there was nothing to prevent him from leaving the road; whether the defendant's servants, in charge of the train, used all possible means to prevent the injury: these, and other similar questions and statements, were not competent evidence.

4. Notice to other persons to keep off the railroad track, did not tend to prove notice to the deceased, and was not relevant to any of the issues in the case; and yet the tendency of such proof was to mislead the jury, by inducing them to suppose they might draw that inference. Nor was the evidence of Harahan, as to the danger to the employees on the train, at all relevant to any of the issues. A wrongdoer can not set up the evil consequences of his wrongful act to himself, as a defense to an action for the injury thereby caused to other persons; but this is the principle on which the admission of the evidence rests. If this principle be correct, it will be to the interest of all railroad companies to employ careless and reckless men in their service, who are equally indifferent to their own danger and that of other persons, whose safety may be intrusted to their care.

5. The cross-interrogatories propounded to the defendant's witnesses, and the answers thereto, were improperly suppressed. The evidence sought to be elicited was relevant and competent, for the reasons stated in the second para-



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graph *supra*. The questions did not exceed the legitimate limits of a cross-examination, and were certainly competent for the purpose of laying a predicate to impeach the witnesses.—1 Greenl. Ev. § 462.

6. The charges given, and the refusal of the charges asked, required only ordinary care and diligence from the servants of the railroad company, and even dispensed with that if the deceased was at fault. The authorities above cited, in the first paragraph, lay down the rule as to the doctrine of contributory negligence, and clearly demonstrate the error in the charges of the court. The decisions of this court, there cited, are founded on common-law principles, and based on justice and sound reason. The statutes of Alabama, which are to be construed *in pari materia*, as forming one general system, require a much higher degree of care, and impose greater responsibilities. An action is given against a railroad company, for causing the death of a human being, whenever such death arises from any wrongful act, omission, or culpable negligence, on the part of any of its officers or agents; and the wrongful act, omission, &c., is defined to be, among other things, a failure on the part of such officers or agents, on perceiving any obstruction on the track, to use all means in their power, known to skillful engineers, to stop the train, or any other misconduct on their part.—Rev. Code, §§ 1399, 1401, 2297, 2300. There are no conditions or qualifications annexed to these requirements. No judicial tribunal can disregard them, or explain them away, or engraft any exceptions on them. Until these requirements have been strictly complied with, no question of contributory negligence can arise.—*M. & O. R. R. Co. v. Malone*, 46 Ala. 391; *N. & D. Railroad Co. v. Coman*, 45 Ala. 437; 5 Amer. 214; 1 Redf. 544; 1 U. S. Digest, N. S. 620, §§ 53-4; 4 Cush. 402; 4 How. 468; 9 Metc. 1; 1 Amer. R. R. Cases, 591.

7. Another grave error in the charges of the court is in absolving the defendant from responsibility, "unless the injury was *wanton and intentional*;" in other words, that the railroad company is not responsible for the consequences of the misconduct of their agents in the transaction of their business, unless the agents were guilty of murder in the first degree. In such a case as that, it is doubtful if a recovery could be had against the railroad company; since, but for the statute, the civil injury would be merged in the felony. *Grant v. Moseley*, 29 Ala. 302. In all actions for damages on account of negligent or tortious acts, the question of intent is immaterial, except as affecting the *quantum* of damages. *Hussey v. Peebles*, 53 Ala. 432; 1 Chitty's Pl. 129; 2 East, 104.



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RICE, JONES & WILEY, *contra*.—1. If the plaintiff's testator, by his negligence, contributed to the injury complained of, there can be no recovery against the railroad company. "For a person, engaged in his ordinary affairs, or in the protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery."—*Eckert v. Long Island Railroad Company*, 3 Amer. 723. To the same effect is the case of *Bellefontaine Railway Company v. Hunter*, 5 Amer. 205-215. These cases, and the authorities cited in them, are decisive of the principles of law involved in this case, when applied to the pleadings and evidence; and they show that the court committed no error in the instructions to the jury.

2. The declarations of the defendant's agents and servants, as proposed to be proved by Mahala Mastin, were merely narrative of a past occurrence, and not admissible as part of the *res gestæ*.—*Ashcraft v. M. & M. Railroad Co.*, 48 Ala. 9; *Thompson v. Mawhinney*, 17 Ala. 362.

3. All the other exceptions as to questions of evidence, when scrutinized, will be found to fall under the principles settled in some one or more of the following cases: *De-Graffenreid v. Thomas*, 17 Ala. 602; *Wall v. Williamson*, 11 Ala. —; *McCargo v. Crutcher*, 27 Ala. 171; *Tyson v. Walker*, 52 Ala.; *McCreary v. Turk*, 29 Ala. 244; *Ocean Ins. Co. v. Francis*, 2 Wendell, 65; *Hiscox v. Hendree*, 27 Ala. 217.

STONE, J.—Speaking of the steam-engine, called by Mr. Justice Caruthers, of the Supreme Court of Tennessee, the "most grand and useful improvement of the age," and of its use as an instrumentality in travel and commerce, we, in *Grey's Executor v. Mobile Trade Company*, 55 Ala. 387, said, that a common carrier, who employs steam as his motive power, must bring to the service "that degree of diligence which very careful and prudent men take of their own affairs." We added, that "in this we but affirm that only very careful and prudent men should be placed in charge of such vehicles of transportation, and that they shall employ their care and prudence actively, as such men watch over their own important interests and enterprises, of similar magnitude and delicacy." In the language quoted, we were speaking of the care and diligence required in the transportation of merchandise. For a much stronger reason, should the rule be observed in carrying passengers, because human life is by far the most cherished and valuable of earthly endowments and possessions.

Of railroads, Mr. Justice Caruthers said: "The policy of

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our decisions has been, so far as consistent with the safety of life and property, to encourage and protect this most grand and useful improvement of the age. But the consequences of carelessness and want of due skill in their management is so frightful and appalling, that the most strict and rigid rules of accountability must be applied, where there is any dereliction of duty. Every reasonable precaution must be used, to avoid accidents and injury to others, at the peril of strict and ample accountability. They enjoy almost a monopoly in the business of common carriers, wherever they exist, both as to persons and property. A necessity to patronize them is imposed upon all, by the circumstances of the times; all other modes of travel and transportation having been superseded by this, on account of its greater ease and astonishing speed. While, on the one hand, the courts should protect them with a strong hand against unjust demands, and injuries to their property, which popular prejudice may favor or inflict; on the other, the security of life and property requires, that they should be held to a strict and skillful performance of all the duties imposed on them by law. All will agree, however, that in the management of locomotives and trains, so powerful for mischief as well as for good, the rules of liability for the destruction of life or property should be such as to impose the duty of very great care and diligence on the part of those who control them."

But this, like all other human duties, has its correlative rights and immunities. Infallibility is not exacted of those in charge of this fearful engine of good and of evil. They are required to be prudent, and skilled in their particular departments. But they deal with those of their fellow-beings who have attained to years of discretion, as intelligent beings, having the sense of danger, and instinct of self-preservation, common to humanity. They are authorized to predicate of such, that, seeing a train approaching in dangerous proximity, they will, if of discreet age, promptly get off the track, and place themselves out of harm's way. They have a right to assume this, for such is the conduct, such the instinct, of the commonest intelligence. For a traveller, whether mounted or on foot, to step from the track of a railroad, is, ordinarily, the work of a moment; while, to stop or check up a train in motion, involves delay, and, on fast lines, a disarrangement of schedule punctuality, which not only might disturb and delay other trains, but might also lead to collisions, with all their fearful consequences. Railroad tracks are not public highways for general travel. They are not constructed for that. They are private property, built and



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adapted exclusively for their own rolling stock; and no one can claim the right to be or remain upon them, as a mere legal right. Like one's domicile, which, in common-law phrase, is called his castle—or, even, like one's freehold, no stranger has the right to be upon it, except by permission of the owner, express or implied.

In a note to section 133, 1 Redf. on Railways, is the following forcible language: "The practice of allowing persons to walk upon a railway track is a vicious one, and one which would not be tolerated in any State or country, where the railways are under proper surveillance and police. But, as it now is in many parts of this country, an engineer will find some person upon his track every mile, and, in some places, every few rods. If he were required to check the train at every such occurrence, it would become an intolerable grievance. If men will insist upon any thing so absurd, as to be permitted to walk upon a railway track at will, they must expect that those who are bereft of sense, but preserve the form of humanity, when they chance to come into the same peril, will perish; not so much from their own infirmities, as from the absurd practice of those who have no such infirmities. And their destruction is not so much attributable, perhaps, to the fault of the railways, as to the bad taste and lawlessness of public opinion, in making such absurd demands upon the indulgence of railways. And, if it be urged that the companies might enforce their rights, and keep people off their tracks; it would be found, we fear, upon trial, that such arguments are unsound. The companies, probably, could not enforce such a regulation, in many parts of the country, without exciting a perplexing and painful prejudice, to such an extent as to endanger the safety of their business. The only effectual remedy will be found in making the act punishable by fine and imprisonment, as is done in England and some of the American States, and in a strict enforcement of the law upon all offenders."

But, the right of a freeholder or householder, to eject from his premises any one found there against his consent, is hedged about with many restraints, imposed for the safety and welfare of the intruder, although, in the eyes of the law, such intruder may be, technically at least, a wrongdoer. He must be first warned to depart. If this fail, then hands may be laid gently upon him to put him out; and, in the extremest case of obstinacy, only so much force may be used, as appears reasonably necessary to accomplish the object. The law so respects human life, and those feelings of self-respect which lie at the foundation of our manhood, that it does not pronounce sentence of outlawry against even



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the willfull or obstinate wrongdoer. It furnishes no measurement, by which to determine the relative value of human lives. "Thou shalt not kill," has been a prominent canon in all civilized governments.—Shearman & Redfield on Negligence, § 24.

The doctrine of contributory negligence was declared, long before steam was utilized as a mechanical force. It was first adapted to collisions of vessels, and of vehicles on the public highways. It was ruled that, in the adjustment of losses in admiralty proceedings, comparative negligence would be taken into the reckoning, and the burden of the loss adjusted accordingly. But, in suits at common law by one party, to recover damages caused by the collision, the declared rule was, that if the plaintiff, by his negligence, contributed proximately to the injury, he could not recover, although the fault of the defendant may have greatly exceeded his own. The law court would not enter upon the inquiry. This principle did not rest on the idea, that one wrong set off the other, or that one justified the other. It was founded on the broader ground, that when the negligence of the plaintiff has contributed proximately to the injury, the damage is considered of his own producing, and it is difficult, if not impossible, to determine the *quantum* of injury which resulted from the defendant's tortious or negligent conduct. The theory was, that in such case, if the plaintiff had himself done no wrong, no injury would have resulted. Therefore, to allow such plaintiff to recover in such case, would be to allow a recovery for the proximate consequences of the plaintiff's own negligence. The rule was, however, that to constitute a good defense in bar, the plaintiff's contributory negligence must be proximate, not remote. Wharton on Neg. §§ 300, 301; Shearman & Redf. on Neg. § 24; *Railway Co. v. Whitton*, 13 Wall. 270; *Same v. Gladmon*, 15 Wall. 401; *Johnson v. Hudson Riv. R. R. Co.*, 20 N. Y. 65; *Ernst v. Same*, 35 N. Y. 9; *Renwick v. N. Y. Central R. R. Co.*, 36 N. Y. 132; *Parker v. Adams*, 12 Metc. 415; *Shaw v. Boston & Worcester R. R. Corp.*, 8 Gray, 45; *Wynn v. Allard*, 5 Watts & Serg. 524; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Reeves v. Del. L. & Western R. R. Co.*, 30 Penn. St. 454; *Toledo & Wab. R. R. Co. v. Goddard*, 25 Indiana, 185; *Ill. Central R. R. Co. v. Phelps*, 29 Ill. 447; *Same v. Weldon*, 52 Ill. 290.

A qualification of the doctrine has been affirmed, to the effect that, notwithstanding each party may have contributed proximately to the result, yet, if the defendant wantonly, recklessly, or intentionally brought about the result, mere

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negligence in the plaintiff, contributing proximately to it, will not bar his right of recovery.

Legal principles, framed for one state of society, for one state of mechanical development, are not necessarily adapted to a more advanced development. Progress in industrial arts requires a modification of judicial rules. The steam-engine has revolutionized labor and commerce, and has made it necessary to ordain a new legal system for its protection and government.

In most cases of railroad accidents, the conduct, from which negligence is sought to be inferred, presents itself in at least two stages; first, in placing parties in a situation of peril; second, in employing or not the proper means to avert the impending danger. Diligence is required of both parties—the railroad employees, and the person endangered—through all the stages; and the negligence of one party does not excuse the other from the employment of proper diligence, until the danger be passed. If those in charge of a train, even in the rightful exercise of their skill and diligence, find a person dangerously exposed, although such exposure was brought about by the negligence of such person, the duty of diligence resting on the officers of the train is not in the least diminished on that account. In such case, although they will stand acquitted of all blame in this first stage of the peril, yet, when the peril has become reasonably manifest, so as to create the presumption that it was comprehended, each party must again be diligent to prevent the catastrophe. If the person endangered be negligent at this crisis, and suffer injury, which proper care and diligence could have averted, the law affords him no redress. On the other hand, if employing proper care and diligence to escape the danger, to which his own previous negligence had contributed proximately to expose him, those in control of the train fail to apply proper skill and diligence to avoid the injury, when such skill and diligence, if promptly resorted to, might have prevented it, this is wanton or reckless negligence, for which the railroad will be held accountable. In such case, the negligence of the person injured, which first placed him in jeopardy, becomes remotely contributory to the actual injury sustained, and is no bar to the suit. This rule, however, does not apply where the manifestation of the peril and the catastrophe are so close in point of time, as to leave no room for preventive effort.

As we understand the rule of contributory negligence, it has been modified substantially, as we have indicated above. Wharton, *Law of Negligence*, § 300, says: "If the defendant is guilty of gross negligence, he can not set up a trifling neg-



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ligence or inadvertence of the plaintiff as a defense." Shearman & Redf. on Neg. § 25, after stating the general rule, that a plaintiff can not recover, if he has been guilty of proximate contributory negligence, "so that, but for his concurring and co-operating fault, the injury would not have happened to him," excepts from the operation of the rule cases "where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." In 2 Redf. on Railways, § 177, it is said: "If the defendant is guilty of a degree of negligence, from which the plaintiff, with the exercise of ordinary care, can not escape, he may recover, although there was want of prudence on his part; and in many cases, the plaintiff has been allowed to recover for the gross negligence of the defendant, notwithstanding he was, at the time, a trespasser upon the defendant's rights."

In the case of *Tuff v. Warman*, 5 C. B. Rep. N. S. 573, the English Court of Exchequer said: "Mere negligence, or want of ordinary care or caution, would not disentitle a plaintiff to recover, unless it were such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of carelessness or neglect on the part of plaintiff."

In *Greenland v. Chaplin*, 5 Exch. Rep. 243, Ch. B. Pollock said: "I entirely concur with the rest of the court, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen, if you yourself had not been guilty of negligence.' I think that, where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." See, also, case of *Tuff v. Warman*, 5 C. B. Rep. N. S. 573.

In the case of *Button v. Hudson River R. R. Co.*, 18 N. Y. 248, the court said: "The deceased was found lying on the track. This fact was as much the proximate and immediate cause of his death, as the fact that the defendant's cars passed over his body. The death was the combined result of both causes. The jury should have been instructed that, this being the case, the only question for them to decide was, whether, by the exercise of reasonable care and prudence, after the deceased was discovered, the driver might have saved his life." See, also, *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 310.

In *Spofford v. Harlow*, 3 Allen, 176, the court said: "A



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party may be acting in violation of some particular statute, and still be under the general protection of the law. A third person has no right, merely because he is thus in fault, to run into him and injure him carelessly and recklessly." See, also, *Linfield v. O. C. R. R. Co.*, 10 Cush. 562.

In *Macon & W. R. R. Co. v. Davis*, 18 Geo. 686, the court said: "But it is insisted, that if the injury in this case resulted, in whole or in part, from the misconduct of the plaintiff's servant, that he can not recover; and this seems to have been the rule laid down in *Butterfield v. Forrester*, 11 East, 60, and *Luxford v. Large*, 5 Car. & P. 421. But this doctrine has been modified in later cases; and in *Lynch v. Nerden*, 1 Adol. & El. N. S. 29, it was held, that the defendant was liable in an action on the case, though plaintiff was a trespasser, and contributed to the mischief by his own act.

We approve of this modification of the principle, and think that it ought to be left to the jury to say, whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented the collision." To the same effect is *Augusta & Sav. R. R. Co. v. McElmurry*, 24 Geo. 75.

In *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 172, the court said: "The doctrine that where both parties are in fault, the party sustaining the injury can not recover, is subject to several very material qualifications."

In *Brown v. Han. & St. Jo. R. R. Co.*, 50 Mo. 461, the court said: "The fact that one person is in the wrong, does not, in itself, discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. The cases are numerous, where parties have been held responsible for their negligence, although the party injured was, at the time of the occurrence, culpable, and, in some cases, in the actual commission of a trespass."—See, also, *Kennayde v. Pac. R. R. Co.*, 45 Mo. 245.

In the case of *Raiford v. Miss. Cen. R. R. Co.*, 43 Miss. 233, the court said: "The fact that the animals were on the road, did not justify the agents and servants of the company in regarding them there unlawfully, and in violation of the rights of the company, and in any measure release the company's servants from the observance of proper care and precaution for their safety."—See, also, *Corwin v. N. Y. & E. R. R. Co.*, 3 Ker. 42; *Wright v. Brown*, 4 Ind. 95; *Davies v. Mann*, 10 Exchequer, 546; *Bridge v. Gr. Junction Railway Co.*, 3 Mees. & Wels. 244; *Eckert v. L. I. R. R. Co.*, 43 N. Y. 502; *St. Louis, A. & T. H. R. R. Co. v. Manly*, 58 Ill. 300.

In the case of *Owners of Steamboat Farmer v. McCraw*,  
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26 Ala. 189, this court said: "Because a flat-boat runs at night, when she should not, or ties up in the wrong place, would not justify a steamboat in running into her, any more than a stage-coach would be justified in willfully or carelessly running over a man lying asleep in the road; and in all such cases, if the act causing the injury could have been prevented by the use of ordinary care, the failure to use it will render the party liable."—See, also, *Foster v. Holley*, 38 Ala. 76.

In the case of *Gov. St. R. R. v. Hanlon*, 53 Ala. 70, the defense relied on was contributory negligence. It was decided, that an infant, before reaching years of discretion, could commit no negligence; that the negligence of the adult, having the care of him, was not his negligence; and that, therefore, the defense of contributory negligence could not prevail against such infant. The court had said: "The general principle, that although a defendant has been guilty of culpable fault or negligence, producing an injury, yet, if his act was not wanton *and* intentional, and if the plaintiff, by his own misconduct or negligence, amounting to a want of ordinary care, essentially contributed to produce the result, he can not recover, is not controverted." This question was not necessarily before the court, and was stated as a conceded proposition. The word *and*, between the words *wanton* and *intentional*, should be *or*. Either wanton, reckless, or intentional injury done, overcomes the defense of contributory negligence. It is not necessary they shall all concur. To so hold, would be to decide that railroads and other corporations could probably never be held accountable for injuries caused by the misconduct or incapacity of their employees, if the person aggrieved had, by his own negligence or fault, contributed proximately to the result. It is doubtful if the doctrine of *respondeat superior* applies, where the servant or agent intentionally or willfully does the act complained of.—See 1 Redf. on Railways, 511, *et seq.* We, however, leave this question open.

We hold, then, that the defense of contributory negligence is not made good, if the plaintiff, after contributing by his own negligence to place himself in peril, employs proper diligence to extricate himself, and the defendant neglects to use diligence, which might have prevented the catastrophe. We hold further, that in this, as in all other services required of those having the control of railroad trains, the law exacts "that degree of diligence which very careful and prudent men take of their own affairs."—See *Ala. & Fla. R. R. Co. v. Waller*, 48 Ala. 459, 463. The demurrer to the third plea should have been sustained.

If the witnesses who alone saw the disaster, which re-



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sulted in the death of Mr. Tanner, be believed, he, the deceased, was on the track of the railroad, where he had no legal right to be ; had timely warning and knowledge of the approaching train, and could have got off the track, much sooner than he seems to have attempted to do so. But for the fright of his horse, resulting in throwing him off, he would have escaped the danger. His horse did escape, which proves, at least, that he was dismounted when the train struck him. Unlike animals, often found on railroad tracks, Mr. Tanner was an intelligent human being, knew the speed and momentum of railroad trains, and should have got off the track. Doubtless he intended to do so. He possibly miscalculated his ability to reach the crossing, just ahead of him. The persons in charge of the train, perceiving by his movements that Mr. Tanner knew of their approach, were justified in supposing he would leave the track before they would come up with him. The testimony, in which there is no material conflict on this question, shows there were points at which he could have done so with safety. The law does not require that trains shall be stopped, or checked up, when persons of discreet years are seen on the track, unless, from their position or movements, or other cause, it can be inferred that they are not apprised of the approaching danger, or, from some other cause, they are unable to leave the track. Such requirements of railroads would greatly impede their business, and would do them a great wrong. When Mr. Tanner was thrown from his horse, upon the track, it became manifest that he was in peril, from which he could not probably extricate himself. It then became the duty of those in charge of the train, to use every means within their power to stop the train ; and if they failed to do so, and the jury should be satisfied that such exertions, promptly employed, would probably have arrested the train, and saved Mr. Tanner, then the charge of negligence is fastened on the railroad, and it must make reparation.—*Phila. & Reading R. R. Co. v. Hummell*, 44 Penn. St. 375.

What we have said above is based on the theory, that Mr. Tanner knew of the approach of the train, and that the surface of the contiguous ground was such, that there were points at which he could have left the track. Of course, if he were in a deep cut, or on a high embankment, which rendered it doubtful if he could pass beyond them before the train would overtake him, the train officers, being supposed to know the topography, should at once have taken measures to avert the danger.

On two questions, the charges and refusals to charge in  
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the Circuit Court were in conflict with the rules we have declared above. One is, that the Circuit Court fixed the degree of diligence required of railroad officers at too low a degree. Ordinary diligence does not meet the reasonable requirements of such travel and transportation. The other error is based on that clause which, in the case of *Gov. St. Railroad v. Hanlon, supra*, conjoins the words "wanton" and "intentional." Either wantonness, or intention, on the part of defendant, will overcome the defense of contributory negligence. We consider it unnecessary to apply these principles to the various rulings of the Circuit Court, as what we have said above will furnish a sufficient guide on another trial. We have attempted to declare certain exceptions, which the later adjudications have engrafted on the doctrine of contributory negligence.

What the railroad employees said, while returning to Athens with Mr. Tanner, or after they reached Athens, were no part of the *res gestæ*, and were properly excluded.—*Rigby v. Williams*, 80 Penn. St. R. 107; *B. Railway Co. v. Hunter*, 33 Ind. 335.

The Circuit Court erred, in allowing defendant to prove that there was danger to employees on the train in running over stock.—*Montg. & West Point R. R. Co. v. Edmunds*, 41 Ala. 667. The court also erred, in allowing proof to be made that defendant's agents had notified persons, other than plaintiff's intestate, not to travel on the railroad track.

The witness Brown should not have been asked, or allowed to tell, that he used "all the means he had to stop the train." He could state what means he did use. The latter part of interrogatory 21, objected to, should have been excluded. It called for conclusions, or inferences, of the witness. Interrogatory 15 is objectionable in form, and should have been excluded. The witness should have been interrogated as to what means he did employ.

As to the questions asked defendant's witnesses on cross-examination, with a view to their impeachment, we think the ruling of the Circuit Court can not be maintained. Large latitude should be allowed in cross-examination; and we will not say the questions should not have been allowed, aside from all purpose of impeachment by other witnesses. As a predicate for proof of prior contradictory statements made to others, they were unquestionably admissible, when time, place, and circumstance were given.

Judgment of the Circuit Court reversed, and cause remanded.

[Thames v. Caldwell et al.]

**Thames v. Caldwell et al.***Bill in Equity to enforce Vendor's Lien on Land for Unpaid Purchase-Money.*60 644  
74 301

1. *Waiver of vendor's lien.*—Where the purchaser died, not having paid the purchase-money, and the land was sold by his administrator under a decree of the Probate Court; and the vendor afterwards accepted from the purchaser at that sale, in satisfaction of his claim against the land, a draft on a third person, surrendered the note given for the purchase-money, and collected a part of the money on the draft in Confederate currency; *held*, that these facts proved a waiver and relinquishment of the vendor's lien.

**APPEAL from the Chancery Court of Butler.**

Heard before the Hon. ADAM C. FELDER.

The bill in this case was filed on the 1st September, 1869, by William H. Thames, who died pending the suit, and it was thereupon revived in the name of his widow as administratrix; against Henry M. Caldwell, John T. Milner, and the administrator and heirs of John B. Massey, deceased; the said Milner being sued individually, and as the administrator of the estate of Willis J. Milner, deceased. Its object was to enforce an alleged vendor's lien for the unpaid purchase-money of a tract of land, which was sold and conveyed by the complainant, on the 1st October, 1859, to said John B. Massey, since deceased. The agreed purchase-money was \$2,000, for which said Massey gave his two promissory notes, for \$1,000 each, payable three and fifteen months after date, respectively; and the complainant executed and delivered to him a deed for the land, reciting therein that the purchase-money had been paid. The said John B. Massey died, intestate, in January, 1860, and letters of administration on his estate were granted to his widow. The note last falling due was transferred by the complainant to one Routen, and was paid by Massey's administrator; but the bill alleged that the first note was still due and unpaid, was a lien on the land in favor of the complainant, and was in the possession of said Caldwell and Milner, who claimed it, and who obtained it under the following circumstances: Massey's administrator having obtained from the Probate Court an order to sell the lands, the complainant gave notice at the sale of his lien for the unpaid purchase-money; and said Henry M. Caldwell, who was present, and heard the notice, became the purchaser of the lands, as the agent of

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Willis J. Milner, who was his father-in-law. Afterwards, about the 8th March, 1874, Caldwell "proposed to complainant to make some arrangement with him for the extinguishment of his vendor's lien on said land, and proposed to pay a certain sum in Confederate States treasury-notes, and give a draft in your orator's favor on John T. Milner, who was his brother-in-law, payable at sight, for the balance of the purchase-money which might be due; the draft, when paid, or the amount thereof, to be charged by the payer to account of said Willis J. Milner, for whom said Caldwell was acting as agent; and your orator agreed to accept the money offered, and to receive the draft, but with the distinct and express understanding, that he was to part with no right of his unless the draft was paid." Under this arrangement, the bill further alleged, Caldwell paid the specified sum in Confederate States treasury-notes, and gave a draft on John T. Milner for the estimated balance; and the complainant "received the said draft, or order, and delivered said promissory note to said Caldwell, but with no agreement that said draft, or order, was received in payment and discharge of the balance then due on said note, or of your orator's said lien." John T. Milner refused to accept the draft, but paid \$300 on it, in Confederate currency, to the complainant, on the 1st August, 1864; which was entered as a credit on the draft. The draft was made an exhibit to the bill, and is referred to in the answers and depositions as "Exhibit C," but it is not copied in the transcript.

Answers on oath were waived. Separate answers were filed by Caldwell and Milner, and decrees *pro confesso* were taken against the other defendants. Caldwell denied that, at the time he bought the land for W. J. Milner, he had any notice of the complainant's alleged lien on the land, or that complainant gave public notice of his lien at the sale by Massey's administrator; but he admitted that he had notice before payment of the purchase-money. As to the transaction between him and the complainant, by which he acquired Massey's note, and gave complainant the draft on John T. Milner, he alleged the facts to be as follows: "About 8th March, 1864, being desirous of paying for said lands, and not being willing to pay while a vendor's lien subsisted against the lot, respondent went with complainant to B. F. Porter, who was then the attorney and agent of said Massey's administratrix; and all three consenting and agreeing together, a calculation was made as to how much was due on complainant's unpaid note for the purchase-money, and another calculation as to how much was due from Willis J. Milner to said Massey's estate, for the purchase-money due from him.



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Complainant then, as he had agreed to do, took part payment of his note in Confederate States treasury-notes, and expressed a willingness to take payment of the remainder in the same kind of currency; and respondent offered to get it for him, if he wished it; but complainant replied, that a draft on John T. Milner would do him as well as money. Thereupon, respondent executed and delivered said draft, and complainant accepted it, with the money paid him as before stated, in full discharge and satisfaction of his said lien note, which he then and there gave up to said Porter, as the attorney of said administratrix; and, further to evidence fully the intention of the transaction, he at the same time gave said Porter a receipt, in full payment and discharge of the note he had so given up. At the same time, and as part of the same transaction, respondent paid to said Porter, for said Willis Milner, the balance due on said Milner's bid for said land, amounting to something like \$2,500; and took from said Porter, as attorney for said administratrix, a receipt in full for the payment by said Willis Milner of the amount bid by him for said land. The whole transaction was, in substance, this: Willis J. Milner, by respondent as his agent, induced complainant to take Confederate money in extinguishment of his vendor's lien; this said complainant did take, accepting a draft in lieu of part of the money; and said Porter, as agent of the administratrix, accepted the extinguishment of the Thames debt, which had been presented to the administratrix, and was a valid claim against said estate, then solvent, in part payment of the purchase-money due from Willis Milner, and took the balance in money." As to these facts, the answer of John T. Milner was substantially the same as Caldwell's; and he averred that he had always been willing to accept or pay the balance of the draft in Confederate money, according to the understanding and agreement between the parties when it was given, but complainant would not accept it, and demanded United States currency. Each of said respondents further alleged, that the estates of Willis J. Milner and of Massey had each been declared insolvent, and that the complainant had failed to file his asserted claim against either estate within nine months after the declaration of insolvency.

The complainant's own deposition was taken in his behalf, in which he stated the facts substantially as alleged in the bill; and the depositions of Caldwell and Milner were taken on the part of the defendants, repeating substantially the averments of their answers. The defendants also took the deposition of J. D. Porter, who was the son of said B. F. Porter, and who testified that, at the request of said Caldwell, he

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had examined and searched among his father's papers, for the receipt which the complainant had executed, as stated by Caldwell; that he had found it, and filed it away, but afterward lost or misplaced it, and could not produce it; that he had read it carefully, and that it contained an express relinquishment of the vendor's lien on the land. On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without delivering any written opinion, or stating the reasons on which his decree was founded; and his decree is now assigned as error.

THOS. H. WATTS, with GAMBLE & BOLLING, for appellant.

HERBERT & BUELL, *contra*.

MANNING, J.—After a careful examination of the pleadings and evidence in this cause, we are unable to perceive that the chancellor erred in his decree. The preponderance of the testimony is in favor of the conclusion that the real estate, which appellant's intestate sold and conveyed to John B. Massey, was released from the equitable lien the vendor might have asserted for the payment of the purchase-money, by his subsequent dealings in respect to it with the persons who bought the property afterwards, at the sale of it as a part of the estate of Massey after his death. It is unnecessary to discuss the testimony in respect to that transaction, or to consider what effect upon the vendor's equitable lien the failure to present the claim to the debtor's administrator would have under the statute of non-claim. The difference between the interest of a mortgagee, who has an estate in the mortgaged property, and the equitable lien of a vendor, upon lands which he has conveyed by an absolute deed, without having received payment of the purchase-money, is briefly noticed in *Halfman's Executors v. Ellison*, 51 Ala. 543.

The decree of the chancellor must be affirmed.

## Brown et al. v. Grimes.

*Bill in Equity for Legacy and Account, and to set aside Release.*

1. *Pecuniary legacy; what is.*—A bequest of "one-third of the valuation of the lands hereinafter devised to my brother Henry," to whom the lands were devised "subject to the incumbrance that he shall pay one-third of the valuation of said lands to the said" legatee, is a pecuniary legacy, though charged on the land.

[Brown et al. v. Grimes.]

2. *Who may sue for legacy, on death of legatee.*—The right to sue for and recover a pecuniary legacy, on the death of the legatee, intestate, not having received it, devolves on his personal representative; and it can not be recovered in equity by his children, as heirs and distributees, although the bill alleges that he owed no debts at the time of his death.

3. *Husband's distributive interest in wife's estate.*—On the death of the wife, intestate, leaving a statutory separate estate (Code of 1876, § 2714), the husband is entitled to one half of the personality.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 4th January, 1875, by William G. Brown and others, only children of Elizabeth Brown (afterwards Gunn), deceased, the infants suing by their next friend, George W. Gunn, who was the father of one, and the step-father of the others; against the administrator and heirs-at-law of Henry H. Grimes, deceased. Its object was to recover a legacy, which had been bequeathed to the complainants' mother, then Elizabeth Moore, by the will of B. M. Adams, deceased, who was her aunt; to enforce it as a trust or charge upon a tract of land, which said testatrix had devised to said Henry H. Grimes, since deceased, and which was in the possession of the defendants, his children and heirs; and to set aside a receipt and release which the complainants' mother had executed to said Henry H. Grimes, for and on account of the legacy. The will of said testatrix was duly admitted to probate in said county of Macon, where she lived and died, on the 11th June, 1860; and a copy of it was made an exhibit to the bill. By the 3d clause of her will, said testatrix bequeathed to her niece, Elizabeth Moore, several slaves, all her household and kitchen furniture, "and one-third of the valuation of the lands hereinafter devised to my brother, Henry H. Grimes;" and by the 5th clause, she devised to said Henry H. Grimes a tract of land containing about fourteen hundred acres, adding to the devise these words: "The said lands are herein devised to the said Henry H. Grimes with the incumbrance of the purchase-money for the same which may remain unpaid at my death, and which it is my will and desire shall be paid out of the said land; and subject to the further incumbrance, also, that the said Henry H. Grimes shall pay one-third of the valuation of said lands to the said Elizabeth Moore."

According to the allegations of the bill, Elizabeth Moore was married in March, 1856, after the execution of said will, but before the death of the testatrix, to James F. Brown, by whom she had several children, and who died in June, 1863. At the death of the testatrix, the tract of land was worth at least \$12,000, and it was appraised by commissioners, some time afterwards, at \$10,980. In January, 1863, Henry H.



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Grimes paid to Mrs. Elizabeth Brown \$2,296.66, on account of her legacy which was charged on the land ; and she gave him a receipt, or release, which specified that it was in full satisfaction of the one-third of the valuation of the land ; but the bill alleged that this receipt, or release, was procured by misrepresentations on the part of said Grimes, in whom Mrs. Brown reposed great confidence ; and also insisted that it was void, because Mrs. Brown's husband was not a party to it, and was in fact ignorant of the transaction. In December, 1864, Mrs. Brown married George W. Gunn, by whom she afterwards had one child ; and she died, intestate, in November, 1869, leaving the complainants her only heirs and the distributees of her estate. No administration was ever granted on her estate, "and she left no debts to pay, or demands outstanding." She never discovered the alleged errors or mistakes in her settlement with said Grimes, and the complainants were first informed as to said errors and mistakes a short time before their bill was filed. Henry H. Grimes died, intestate, in February, 1872, still owning said tract of land ; and his estate was duly declared insolvent. The bill prayed that an account might be taken of the value of the land, and the one-third thereof to which the complainants might be entitled ; that the amount found due to them, with interest thereon, might be declared a lien and charge on the land ; that the said release might be set aside, annulled, and cancelled ; and the general prayer was added, for other and further relief.

The opinion of this court renders it unnecessary to notice the answers or the evidence. On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without delivering any opinion, or stating any reasons for his decree ; and his decree is now assigned as error.

GEO. W. GUNN, and W. C. McIVER, for appellants.

ABERCROMBIE & GRAHAM, *contra*.

STONE, J.—The legacy to Elizabeth Brown, subsequently Gunn, is purely pecuniary in its character ; and the fact that it was made a charge on land does not change its character as a pecuniary legacy. Being a legacy payable in money, when Mrs. Gunn died, intestate, as it is averred, the title and legal right to claim it vested in her administrator, afterwards to be appointed. It did not descend to her children as heirs. They could only claim through a personal representative ; and claiming in that capacity, they would be met by the claim and right of their mother's surviving hus-

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band, to one half her personal estate, under the statute of distributions. The mother was married in 1864, to her last husband, and died in 1869, intestate. There is no averment of a marriage contract between intestate and Mr. Gunn, her last husband, and no averment that he has been divested, in any manner, of control over her estate.—Code of 1876, § 2714; 1 Brickell's Dig. 567, §§ 64, 66; *McConico v. Cannon*, 25 Ala. 462; *Plunkett v. Kelly*, 22 Ala. 655; *Varner v. Young*, December term, 1876. This principle, or this case, is not at all affected by the rulings in *Brashear v. Williams*, 10 Ala. 650; *Marshall v. Crow*, 29 Ala. 178; *Anderson v. Anderson*, 37 Ala. 683; *Perryman v. Greer*, 39 Ala. 133; *Bethea v. McCall*, 5 Ala. 308; *Vanderveer v. Alston*, 16 Ala. 694.

The bill in the present case was dismissed by the chancellor. He stated no ground on which he based his decree. We find the fatal defect noted above, and, without considering any other question, we feel it our duty to affirm the decree of the chancellor.

Decree accordingly.

## *Ex parte Lyon.*

### *Application for Prohibition to Chancery Court.*

1. *Appointment of special administrator ad litem.*—When it is necessary that the estate of a deceased person shall be represented in any proceeding pending in the Probate or Chancery Court, the court is authorized by statute (Code of 1876, § 2625) to appoint a special administrator *ad litem*, either when the estate has no personal representative, or when its acting representative has a personal interest adverse to the estate; but, when there is an acting administrator in chief, who is a party to the suit in his representative character, the court cannot appoint an administrator *ad litem*, and render a decree in his favor, against the administrator in chief in his representative character.

2. *When appeal lies from chancery decree.*—A decree in a chancery cause, in favor of a special administrator *ad litem*, against the administrator in chief, each in his representative capacity, is a decree in favor of the estate, against the estate: is a nullity, there being no adverse interests or parties, and no appeal lies from it.

3. *When prohibition lies.*—A prohibition will be awarded by this court, to vacate and prevent the enforcement of a final decree in chancery which is a nullity, and from which, on account of the entire absence of adverse parties and interests, no appeal will lie.

4. *Some; when peremptory.*—On application to this court for a prohibition, the officer against whom it is asked being duly notified, and the whole cause being fully presented and argued on both sides, a peremptory writ will be awarded in the first instance, without a rule nisi.

5. *Costs.*—The costs of the application in this case were adjudged against the plaintiff in the decree ordered to be vacated, who was a special administrator, and who was left to pursue whatever remedy he might have against the estate in another proceeding.

[Ex parte Lyon.]

APPLICATION by petition by Francis S. Lyon, as administrator of the estate of Edwin A. Glover, deceased, for a writ of prohibition from this court to the Chancery Court of Marengo, to vacate and annul a decree rendered by that court at its June term, 1877, Hon. A. W. DILLARD presiding as chancellor, in a certain cause then pending in said court, wherein Thomas J. Foster, as special administrator of the estate of said Edwin A. Glover, was complainant, and said F. S. Lyon and others were defendants. The petition alleged these facts: 1. That Thomas J. Foster was appointed by the Probate Court of Marengo, on the 19th October, 1875, special administrator of the estate of said E. A. Glover, deceased; and on the 26th October, 1875, as such special administrator, he filed a bill in the Chancery Court of Marengo, against the Briarfield Iron Works Company, F. S. Lyon individually, B. W. Whitfield and others; a copy of which bill, with all the proceedings had thereon, was made an exhibit to the petition. 2. That on the 2d November, 1875, general letters of administration on the estate of said Glover, with the will annexed, were granted to the petitioner, F. S. Lyon, by said Probate Court of Marengo; and on appeal to this court, from that decree, by one Pearson J. Glover, the decree of the Probate Court was affirmed, on the 30th March, 1876, after striking out the word "forthwith" as used in said decree; and the petitioner thereupon entered on the duties of the office of administrator with the will annexed, and continued to discharge them up to the filing of his petition in this case. 3. That he refused to be made a complainant in said pending chancery suit in his representative character, "or to further prosecute said suit, or in any way to countenance the same in his representative capacity, being satisfied that it was not really instituted in the interest of said estate; and he never became a party to said suit as such administrator." 4. That on the 6th April, 1877, the chancellor rendered a decree in said cause, reciting therein that said cause had been submitted at the November term, 1876, by said Foster as special administrator, and petitioner as administrator in chief, for a decree in vacation on the single question of costs; decreeing that said Foster was entitled to costs, and a reasonable solicitor's fee, and the receiver in the cause was also entitled to his expenses and reasonable compensation, to be paid out of the assets of said Glover's estate in the hands of petitioner as such administrator; and appointing H. A. Woolf as special master to ascertain and report as to such costs and expenses. But the petitioner alleged that he "never at any time submitted said cause to the court, on the question whether the costs of the suit should be



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decreed to be paid by him in his representative capacity, but at all times protested that he was not a party to the suit as such administrator, and that no decree could be rendered against him." 5. That the special register executed the order of reference in the cause, the petitioner declining to appear before him, and made his report to the chancellor on the 18th June, 1877; and the chancellor thereupon rendered the following decree:

"In this cause, the report of the special register, H. A. Woolf, having been filed and received; and it appearing that said report is made in conformity to the former orders and directions of this court, and has laid over one entire day after being read; and there being no exceptions filed thereto; and it further appearing that said F. S. Lyon, administrator in chief of said Edwin A. Glover, had due notice of the time and place of executing said reference; it is now ordered, decreed, and adjudged by the court, that said report be in all things confirmed and recorded. It is ordered, decreed, and adjudged by the court, that the estate of Edwin Glover, deceased, in the hands of F. S. Lyon, administrator as aforesaid, whether the same be real, personal, or mixed, is justly liable for the payment of the several sums reported by said special register to be due, and that said sums so reported be, and they are hereby, declared to constitute a lien upon the assets of said Glover's estate, now in the hands of his personal representative, F. S. Lyon. It is ordered, decreed, and adjudged by the court, that T. J. Foster, register, recover of F. S. Lyon, administrator of Edwin Glover, deceased, the sum of \$1,115.65, for the officers and persons named in the report of said special register, in the amounts reported to be due them respectively; and that the receipt of said Foster shall operate as a full discharge of said sums to the said administrator of Edwin Glover. It is decreed, also, and adjudged by the court, that execution may issue for said sum of \$1,115.65, together with \$30, fee allowed to said special register, for his services in stating said account; and that said execution shall run in the name of T. J. Foster, register, to the use of the persons named in the report of said special register. It is further ordered by the court, that there being no question in the cause save that of the costs of suit, and no costs being taxed against the other defendants to the bill, it is considered by the court that said bill be dismissed, as to all the defendants except F. S. Lyon as administrator of Edwin Glover, deceased."

The petition further alleged that an execution was issued on this decree, which was returned "No property found;" and that all the persons named therein, except the special

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register, asserted the validity of the decree, and sought to enforce payment of the several sums awarded to them respectively. The petitioner insisted that the said decree was void, and prayed a writ of prohibition to prevent any further proceedings to enforce it. The above are all the facts stated in the petition; but the accompanying transcript, which was made an exhibit to the petition, shows that, on a motion for the appointment of a receiver in the cause by the original complainant, and a counter motion by Lyon as administrator to dismiss the bill, the chancellor rendered a decree on the 15th November, 1875, holding that it was a proper case for the appointment of an administrator *ad litem* under the statute (Code of 1876, § 2625), and appointing said Foster as such administrator; and he accepted the appointment in writing.

W. E. & R. H. CLARKE, for the petitioner.

BRAGG & THORINGTON, *contra*.

STONE, J.—It is declared in the Code of 1876 (§ 2625), that “In all proceedings in the Probate and Chancery Courts, . . . where the estate of a deceased person must be represented, and there is no executor nor administrator of such estate, or the executor or administrator thereof is interested adversely thereto, it shall be the duty of the judge of the court in which such proceeding is had to appoint an administrator *ad litem* of such estate, for the particular proceeding, and without requiring a bond of him.” Section 2626: “Whenever, in such proceedings, the estate represented by such administrator *ad litem* shall be entitled to a decree for the recovery of money, or for the possession of real or personal property, such decree shall be rendered in favor of such administrator *ad litem*, for the use of such estate; and when such decree is for the recovery of money, and such estate has no executor nor administrator, execution shall issue on such decree in favor of such administrator *ad litem*, for the use of such estate, and the amount thereof shall be paid, by the officer collecting it, to the judge of the Probate Court, or the register of the Chancery Court, or the officer acting as such, out of which such execution issued.”

The administrator *ad litem*, in the present case, was appointed after Mr. Lyon had been appointed administrator in chief of the estate of Edwin A. Glover. Hence, this is not a case where “there is no executor nor administrator of such estate.” If it can be maintained at all, then, it must rest on the ground, that this record presents a case where “the ad-

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ministrator thereof is interested adversely thereto;" that is, where the personal interest of the appointed administrator in chief is adverse, or antagonistic, to the interest of the estate involved in the litigation. Such appointment of an administrator *ad litem* is made, and can only be made, in the interest of the estate—as the representative of the estate—against an adversary personal interest in the rightful administrator. Hence, it is declared that, when there is a recovery, the "decree shall be rendered in favor of such administrator *ad litem*, for the use of such estate;" and whatever recovery may be had, in such case, will be assets of the estate. It would be an anomaly in judicial proceedings, for an administrator *ad litem* to recover of the administrator in chief assets of the estate of which each of them was the personal representative, suing and being sued in their representative capacity, when any recovery that may be had will be for the use of the estate. Foster, as administrator *ad litem* of Glover, suing Lyon as administrator in chief of Glover, furnishes no antagonistic interests which can be the subject of a suit. Glover's estate can not sue Glover's estate. To a suit by an administrator *ad litem*, the rightful administrator of the same estate may be a defendant in his individual capacity. He cannot be in his representative capacity.

In the present record there is a final money decree, in favor of Foster, as administrator *ad litem* of Edwin A. Glover's estate, against Lyon, as administrator in chief of the same estate, to be paid out of the assets of said Glover's estate in said Lyon's hands; and execution is ordered to issue for its collection. The present application is for a prohibition, to arrest the proceedings, and to prevent the enforcement of said decree.

In *Ex parte Greene and Graham*, 29 Ala. 52, we said, the power to issue the writ of prohibition should never be exercised, except in cases "where the relator has no other adequate remedy."—See, also, *Ex parte Smith*, 23 Ala. 94; *Ex parte Walker*, 25 Ala. 81. In High on Extraordinary Legal Remedies, § 770, is the following language: "Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists; and it is always a sufficient reason for withholding the writ, that the party aggrieved has another and complete remedy at law."

We do not think Mr. Lyon, as administrator of Glover,  
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was rightly made a party defendant to this suit. He is not, in the pleadings, made a party in that capacity. It requires more formal proceedings than a recital in the chancellor's decree, of the only words found in this record bearing on that question, to bring a stranger into the suit, and uphold a decree against him. The recital is: "This cause being submitted at the ——— term, ———, by T. J. Foster, special administrator of Edwin Glover, and F. S. Lyon, administrator in chief of said Glover, for decree in vacation." Still, there is a decree against Mr. Lyon, as the administrator of Edwin A. Glover's estate, condemning the assets in his hands to the payment of an ascertained sum of money, rendered in favor of Mr. Foster, and ordering an execution to be issued for its enforcement. This has all the attributes of a final decree, from which, under ordinary circumstances, an appeal would lie to this court.—Code of 1876, §§ 3916, 3927. Will it lie in this case, and what would be the result, if the case should be brought here by appeal? We have shown, above, that Mr. Lyon was not properly made a party as administrator of Glover, and, consequently, there was error in decreeing against the assets of Glover's estate in his hands. But the decree is in favor of Mr. Foster, as administrator of the same estate. An appeal by Mr. Lyon, and assignments of error, would necessarily be in his representative capacity, against Mr. Foster, in his representative capacity; an appeal by Glover's estate, to obtain the reversal of a decree in favor of Glover's estate. This, as we said *supra*, presents no antagonistic interests—no adversary parties—and can not be the subject-matter of a suit. On such appeal, whether we affirmed or reversed the decree, we would necessarily decide in favor of the estate of Glover, against the estate of Glover. The usual and ordinary forms of legal remedies can not reach the errors shown in this record. This, then, presents a clear case for a writ of prohibition, and it must issue accordingly.

In the present case, the chancellor and Mr. Foster have had reasonable notice of the time and place of making this application; the whole record is before us, and the merits of the application have been fully argued. We, therefore, consider it unnecessary to award a rule *nisi*, before awarding an absolute writ.—See *Moore v. Randolph*, 52 Ala. 530.

It is therefore ordered, that a writ of prohibition issue to the Hon. A. W. DILLARD, chancellor of the Western Division of the State of Alabama, prohibiting him, and all the officers of said court, from collecting, or proceeding to collect, the amount of said decree, or any part thereof; and commanding and enjoining him to revoke and annul, or to cause to be

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revoked and annulled, the said decree against F. S. Lyon, as administrator of said estate of Edwin A. Glover, and against the assets of Glover's estate in Lyon's hands. Let the costs of this proceeding be adjudged against Thomas J. Foster.

The final decree in this cause, in the court below, dismissed the bill against all the defendants, except Lyon, as administrator of E. A. Glover. We have seen above that Lyon, as such administrator, has never been rightfully made a party defendant to this suit; and by our order above, we have declared that he has never been made a party in that capacity, and that he cannot be so made. This leaves the present case with only one party of record, T. J. Foster. It is impossible, in this suit, to make or execute a valid decree, that the costs and expenses of this chancery suit shall be paid out of the assets of Glover's estate. If there is any remedy for fastening such charge on the estate, it must be in another proceeding, and probably before another tribunal.

# INDEX.

## ACTION.

1. *For money paid by mistake.*—When money is paid under a mistake of fact, an action at law is the appropriate and only remedy to recover it; but, if paid under mistake of law, it cannot be recovered at all, either at law or in equity.—*Lesslie v. Richardson*, 563.
2. *For money had and received; when principal may maintain action against agent.*—As a general rule, the principal can not maintain an action against his agent, for money collected and not paid over, without a previous demand; but this rule does not apply, where the agent denies his liability, or otherwise shows that a demand would have been fruitless.—*Hammell v. Brown*, 498.
3. *Against municipal corporation, for injuries caused by defective streets or sidewalks; when action lies.*—To render a municipal corporation liable, in a civil action, for special injuries caused by defective streets or sidewalks, it is not necessary that the duty of keeping its streets and sidewalks in repair shall be expressly enjoined by its charter, or any other public statute: the duty and liability arise, when the charter confers express power to open, improve, repair, and keep the streets, &c., in safe condition for travel, and additional power to raise the necessary funds for that purpose, by taxation or assessments; and an action lies in favor of a person who is injured by the neglect of this duty, when he did not bring the accident upon himself by his own culpable negligence, and the defect in the street or side-walk had existed, within observation by the people generally, for such length of time as must have enabled it to be known.—*Albrittin v. Mayor and Aldermen of Huntsville*, 486.
4. *Action by foreign corporation; amendment of complaint in averment of plaintiff's corporate character.*—In an action by a foreign corporation, if the complaint does not aver the plaintiff's corporate character, the cause should not be struck from the docket on that account, but an amendment should be allowed to supply the defect.—*Southern Life Insurance Co. v. Roberts*, 431.
5. *Action on bond; non-joinder of obligors.*—Under the present statute (Code of 1876, § 2904), as under the act of 1818 (Clay's Digest, 323, § 61), joint bonds are made joint and several; and a plaintiff may, at his election, sue one, several, or all of the makers: in an action against one or more, the non-joinder of the others is not pleadable in abatement.—*McKee v. Griffin*, 427.
6. *Action by partnership; statement of partners' names.*—In an action by a partnership, the record must show the individual names of the several partners; although the statute (Code of 1876, § 3038) dispenses with the necessity of proving them, unless denied by plea verified by affidavit, and also (§ 2904) authorizes a suit against a partnership by its firm name.—*Moore & McGee v. Burns & Co.*, 269.
7. *Action on replevin bond.*—An action at law may be maintained on a replevin bond, given in an action of detinue, although the bond, when properly indorsed and returned forfeited (Code of 1876, § 2945), has the force and effect of a judgment: the statutory remedy is merely cumulative.—*Masterson v. Matthews*, 260.



## ACTION—Continued.

8. *Action on judgment; sufficiency of complaint.*—In an action on a domestic judgment, it is sufficient to aver the rendition of the judgment, the court by which it was rendered, the date, names of parties, and amount; and it is not necessary to aver that the court had jurisdiction, nor that the judgment remains of full force, unreversed, and unsatisfied.—*Id.* 260.
9. *Action on the case; when landlord may maintain, against person removing crop.*—A landlord may maintain a special action on the case, against a stranger who, having notice of his statutory lien for rent (Code of 1876, § 3467), carries away the crop from the leased premises, and appropriates it to his own use, whereby the landlord loses his rent; and it is no defense to such action, vindictive damages not being claimed, that the defendant did not intend to injure the landlord.—*Lavender v. Hall*, 214.
10. *Action for use and occupation, by tenant in common.*—Where there has not been a joint letting of lands held by tenants in common, each tenant may maintain a separate action for his proportionate part of the amount due for the use and occupation.—*Wood v. Montgomery*, 500.
11. *Action for money had and received, by assignee of note for rent.*—The assignee of a note, given for the rent of land, may maintain an action for money had and received, against a purchaser of the tenant's crop, who, having bought with knowledge of his lien, has sold the crop, and received the proceeds of sale.—*Westmoreland & Trousdale v. Foster*, 449.

## ADVERSE POSSESSION.

1. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the possession of a third person, holding adversely to the grantor, is void, and the grantee cannot recover on it in an action at law against such adverse holder.—*Chapman v. Holding*, 522.
2. *Same.*—A conveyance of lands, which are at the time in the adverse possession of a third person, under claim of ownership, though without color of title, is void as against the adverse holder, and the grantee can not recover against him in ejectment; and this principle applies to a voluntary conveyance by a purchaser at a sale under execution.—*Bernstein v. Humes*, 582.

## AGENCY.

1. *When principal may maintain action against agent, for money had and received.*—As a general rule, the principal can not maintain an action against his agent, for money collected and not paid over, without a previous demand; but this rule does not apply, where the agent denies his liability, or otherwise shows that a demand would have been fruitless.—*Hammitt v. Brown*, 498.
2. *Authority of agent.*—Authority to sell, and to canvass for the sale of sewing-machines, does not, *per se*, confer on the agent the power to bind his principal by buying or hiring a horse or mule to aid him in carrying on the business.—*Howe Machine Co. v. Ashley*, 496.
3. *Ratification of agent's unauthorized act.*—If the contract between the agent and his principal bound him to furnish a horse or mule for his own use, the acceptance of the profits of his services would not bind his principal, on the doctrine of ratification, to pay for a horse purchased or hired by the agent on credit; and if the rule did apply in such case, a ratification by the principal could not be presumed, unless he had knowledge of the source and circumstances under which the money was earned by the agent.—*Id.* 496.

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## AMENDMENT.

1. *Action by foreign corporation; amendment of complaint in averment of plaintiff's corporate character.*—In an action by a foreign corporation, if the complaint does not aver the plaintiff's corporate character, the cause should not be struck from the docket on that account, but an amendment should be allowed to supply the defect.—*Southern Life Insurance Co. v. Roberts*, 431.
2. *Amendment of sheriff's deed, in description of land.*—When a sheriff, by mistake, in advertising lands for sale under an execution, or order of sale from the Circuit Court, misdescribes a portion of the tract, as by inserting the north-east instead of the south-east quarter of the section, and the mistake is carried into his deed to the purchaser; he may, by leave of the court, pending an action by the purchaser against the defendant in execution for the lands, correct the erroneous description in the deed; and when the amendment is thus made under the order of the court, and in its presence, it relates back to the date of the deed, and entitles the plaintiff to a recovery.—*Ridgway & Wife v. Glover*, 181.
3. *Amendment of petition for sale of lands by administrator.*—When a sale of lands by an administrator, under a decree of the Probate Court, is collaterally attacked, and the record shows that two petitions were filed, one will be considered as an amendment of the other, in order to sustain the jurisdiction of the court.—*Arnett v. Bailey*, 435.

## APPEAL. See ERROR AND APPEAL.

## ARBITRATION AND AWARD.

1. *Statutory provisions as to arbitrations and awards.*—Statutory provisions, prescribing the mode of submission to arbitration, and the requisites of an award, are not in abrogation of the common law, unless expressly so declared.—*Brewer v. Bain*, 153.
2. *Submission of "matters in controversy;" what is included.*—Under a general submission of "the matters in controversy" between the parties, without any further description, if the parties appear before the arbitrators, and submit their partnership accounts and transactions, this renders certain and definite the subject-matter of the submission, and the award will be referred to it.—*Ib.* 153.
3. *Conclusiveness of award.*—An award, valid on its face, may, like a judgment or decree, be pleaded in bar of a subsequent suit founded on the same claim or demand, and can not be collaterally impeached: if the plaintiff assails its validity, on account of extrinsic facts, he must amend his bill, and state specifically the facts on which he relies to avoid it.—*Ib.* 153.
4. *Execution of submission; ratification of unauthorized signature.*—A person who did not himself sign the submission, but whose name was signed by another jointly with his own, and who appeared before the arbitrators, and entered into the arbitration without objection, thereby ratified the signature, if it was unauthorized, and is bound by the award.—*Ib.*
5. *Who must make award.*—Under a submission to two persons named as arbitrators, "they to choose a third man, and their award to be final," an award rendered by the two only, without calling in a third, would be void; but, if the matters submitted relate only to personal property, the terms of the submission may be modified by parol; and if the parties appear before the two arbitrators, and agree to dispense with the selection of a third person, an award may be rendered by the two only.—*Ib.* 153.
6. *Certainty and finality of award.*—An award must be certain, and must dispose of all the matters submitted; but, under a general submission of "the matters in controversy" between the parties, an award of a specified sum of money, as due from one to the other, is sufficient on its face; and if the matters actually submitted were certain partnership transactions between the parties, such an award can not be collaterally impeached, on the ground that it does not decide how the outstanding

ARBITRATION AND AWARD—*Continued.*

- partnership debts are to be paid, or make any disposition of the partnership property received by one partner in excess of that received by the other, in the absence of appropriate allegations and proof that these matters were brought before the arbitrators.—*Ib.* 153.
7. *When award will be set aside, as unconscionable, or oppressive.*—That an award is unconscionable, or oppressive, may be a good ground for setting it aside in equity, at the suit of the losing party, when he is free from all fault or negligence in the matter; but he can not complain that it works him a wrong or injury, when he failed to adduce before the arbitrators the evidence on which he relies to show such wrong or injury.—*Ib.* 153.
  8. *When award will be set aside, on account of error in law.*—Errors of law, committed by arbitrators, will not vitiate an award, unless it appears that they intended to be governed by the law, and were mistaken in the application of well established principles.—*Ib.* 153.

## ATTACHMENT.

1. *Notice of attachment; shown by execution of replevy bond.*—The execution of a replevy bond by the defendant, in an attachment case, is an admission of notice, and is sufficient to sustain a judgment by default at the first term (Code of 1876, § 3723), if executed twenty days before the commencement of the term.—*Peebles v. Weir*, 413.
2. *Levy of attachment; by whom made.*—An attachment, issued by a justice of the peace, and returnable to the Circuit Court, must be levied by the sheriff: a levy by a constable, or a special constable, is void.—*Ib.* 413.
3. *Judgment by default; what will sustain.*—The execution of a replevy bond by the defendant, in an attachment case, is sufficient to sustain a judgment by default, although the levy of the attachment is void, and there was no personal service of process.—*Ib.* 413.
4. *Attachment for rent.*—An attachment for rent, at the suit of the landlord, should be issued against the tenant's crop only, and not against his estate generally; but, if issued against his estate generally, though it would be abated on plea, it is only irregular, and not absolutely void, and may properly be levied on his crop.—*Ellis v. Martin*, 394.
5. *What defects are not available to claimant.*—On the trial of a statutory claim suit, the claimant can not take advantage of defects in the attachment, or other process, which do not render it absolutely void.—*Ib.* 394.
6. *When landlord may sue out attachment against tenant's crop.*—The statute gives a landlord the right to sue out an attachment against the crop of his tenant, in two cases: 1st, "when the tenant is about to remove the crop from the premises without paying the rent;" 2d, "when he has removed it, or any portion thereof, without the consent of the landlord" (R. C. §§ 2961-63). When the crop has been removed by the tenant, without the consent of the landlord, and without paying the rent, the intent of the tenant in removing it, and the distance from the demised premises to which it is removed, are immaterial inquiries, even though it be carried to other adjacent lands belonging to the landlord.—*Masterson v. Bentley*, 520.
7. *Landlord's lien, and attachment against tenant's crop; distinguished from distress for rent at common law.*—The landlord's statutory lien on his tenant's crop, with the remedy by attachment given for its enforcement (Rev. Code, §§ 2961-63), unlike the right to distrain for rent at common law, does not cease at the expiration of the term, and is not impaired by the removal of the crop from the premises, but continues until the crop passes into the possession of a purchaser without notice.—*Lomax v. LeGrand & Co.* 537.
8. *Garnishment against mortgagee.*—A second mortgagee can not, by a garnishment against the first mortgagee, as the debtor of the mortgagor, reach and subject rents and profits received by the garnishee in excess of his debt.—*Toomer, Sykes & Billups v. Randolph*, 356.



## ATTORNEYS.

1. *Privileged communications to attorney.*—When an attorney is employed to devise and consummate a plan, by which the husband may secure lands to the wife in payment of an admitted indebtedness, and is afterwards employed by the wife to file a bill for the specific performance of the executory contract agreed on, he can not testify as a witness, at the instance of a subsequent purchaser from the husband, against the objection of the husband and wife, that a mistake was made in the description of the lands conveyed.—*Blunt v. Strong*, 572.

## BAIL.

1. *Order for bail, on petition for habeas corpus.*—When an application for bail is made to a circuit judge in vacation, "he may fix the amount of bail required, and authorize the sheriff to take bail accordingly" (Code of 1876, § 4849); and on application for *habeas corpus*, by a person arrested under a *capias* after indictment found for murder, praying to be admitted to bail, presented to a circuit judge while holding court in another county of his circuit, accompanied with the written consent of the solicitor that he be admitted to bail in a specified sum, an order directing the sheriff to discharge him, on his giving bond with surety in the sum named, will be held valid under this statute, although granted without any return to the writ, or any hearing under it, and without the presence of the prisoner; and a recognizance taken by the sheriff, pursuant to its terms, will also be held valid.—*Callahan v. The State*, 65.

## BANKRUPTCY.

1. *When assignee must intervene in attachment suit.*—If goods are fraudulently transferred by a debtor, in anticipation of bankruptcy, and are omitted from his schedules, the title of the fraudulent grantee becomes perfect, as against the assignee in bankruptcy, or a trustee appointed by the creditors, unless the latter asserts his claim within two years, as required by the second section of the bankrupt law; and if a creditor attaches them in the hands of the fraudulent grantee, and pursues them through a protracted and expensive litigation for three or four years, without any intervention or claim on the part of the assignee or trustee, the latter can not then have the attachment dissolved, because it was sued out within four months before the commencement of proceedings in bankruptcy, and claim the goods, or their proceeds, as part of the bankrupt's estate.—*Jacobson & Co.'s Assignees v. Sims, Harrison & Co.* 185.
2. *Effect of bankruptcy on execution lien.*—The lien of an execution creditor, whose judgment was rendered before the defendant obtained a discharge in bankruptcy, though no execution was then in the hands of the sheriff, is not destroyed by the bankruptcy, and may be enforced by an *alias*.—*Sheffey v. Davis*, 548.
3. *Sale of lands by assignee in bankruptcy.*—When the title to lands surrendered by a bankrupt is in litigation, and the assignee has not acquired possession, he can not sell them without an order of the court of bankruptcy, made on his petition, after notice to the parties claiming adversely; and a sale by him, without such an order, is a nullity.—*Shaw & Cox v. Lindsey*, 344.

## BASTARDY.

1. *Bond for appearance in court.*—The statutory bond required by the justice of the peace, before whom proceedings in bastardy are instituted (Code of 1876, § 4072), is only intended to secure the defendant's appearance in court to answer the charge, and, having served its purpose when he has appeared, he can not then be heard to question its sufficiency; nor is the bond invalid, because it does not particularly describe or identify the case (§ 4853), when the affidavit and warrant, returned with it, show to what particular case it applies.—*Hanna v. The State*, 100.

BASTARDY—*Continued.*

2. *Examination of complainant by justice.*—When a bond has been taken by the justice, conditioned for the defendant's appearance in court to answer the charge, as required by the statute, and the bond is returned and filed in the court, this is sufficient to show that the necessary preliminary examination was had before him, and to confer jurisdiction on the court to proceed with the case.—*Ib.* 100.
3. *Infancy of female complainant.*—Although the proceeding is instituted by the affidavit of the mother, and costs may be adjudged against her, if a verdict is found for the defendant; yet, the prosecution being conducted in the name of the State as plaintiff, the infancy of the mother is immaterial, and does not render necessary the interposition of a next friend for her.—*Ib.* 100.

BAWDY HOUSES. See CRIMINAL LAW, 5-7.

## BILL OF EXCEPTIONS.

1. *General exception to charge.*—A general exception to an entire affirmative charge, consisting of several distinct propositions, can not be sustained, unless every part of the charge is erroneous.—*Bernstein v. Humes*, 582.
2. *Sufficiency of exception.*—When the bill of exceptions, after setting out a charge given by the court, adds, "and the defendant objected," this sufficiently shows an exception to the charge.—*Howe Machine Company v. Ashley*, 496.
3. *Same.*—When the bill of exceptions states that "the court gave the jury in charge, against the objection of the defendant, the following instructions" as to the form of their verdict, it is doubtful whether this shows a sufficient exception; and if sufficient, it is to the instructions as a whole, and can not be sustained, if any part is correct.—*Chapman v. Holding*, 523.

## BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Computation of time, on bill payable ninety days after date.*—A bill of exchange, dated the 13th October, and payable ninety days after date, falls due on the 11th January next, and is properly protested on the 14th January.—*Bradley v. Northern Bank of Alabama*, 252.
2. *Notary's seal to protest.*—In this case, "looking at the original protest, seventeen years after it was made, and finding upon it a distinct circular outline impression of a seal, with an indented inner edge, or rim, and within this a number of stars in a circular row, and between them and the edge the legend, 'Notary Public, New Orleans, La.',—this, with the signatures," the courts holds, "is sufficient to establish the authenticity of the protest, in the absence of all evidence to create any suspicion of its genuineness"—*Ib.* 252.
3. *Notary's certificate of presentment, demand, non-payment, and notice.*—The statute which makes a notary's certificate "of the presentment for acceptance, or demand of payment, or protest for non-acceptance or non payment, of any instrument governed by the commercial law," etc., "evidence of the facts contained in such certificate" (Rev. Code, § 1089; Code of 1876. § 1336), although improperly placed in the chapter which relates to the appointment, etc., of notaries public in this State, equally applies to the certificates of foreign notaries, when offered in evidence in the courts of Alabama.—*Ib.* 252.
4. *Presentment.*—The certificate of a notary, stating that he presented the bill "at the office of the drawees, to Mr. M., a competent clerk, no member of the firm being therein, and, demanding payment, was answered it could not be paid," shows a sufficient presentment.—*Ib.*
5. *Notice of protest.*—Notice of the protest of a bill of exchange, deposited in the post-office of the city or town in which the indorser resides, and in which the bill is payable and protested, is sufficient to charge him, unless it is shown that the holder also resided there.—*Shelton v. Carpenter*, 201.

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

6. *Transfer of note by executor ; payment to him in Confederate treasury-notes.*—An executor, or administrator, has power to transfer a promissory note, assets of the estate, in payment of a debt due from the decedent; and it was also within his power, having sold property of the estate during the late war, to receive payment of the purchaser's note, before its maturity, in treasury-notes of the Confederate States.—*Ib.* 201.
7. *Assignment of note by administrator.*—A promissory note, payable to an administrator, assets of his intestate's estate, may be transferred or assigned by him without an order of court; and in the absence of fraud, or collusion between the administrator and the assignee, the transfer cannot be impeached by the beneficiaries of the estate, when the assignee attempts to foreclose a mortgage given to secure the note. *Nelson v. Stollenwerck*, 140.
8. *Transfer of note by delivery.*—When a promissory note is transferred by delivery merely, without indorsement, the law implies an obligation, on the part of the transferor, to answer for the genuineness of the note, and his own authority to transfer it; but, as a general rule, he incurs no other liability by such transfer, and his connection with the note as a party ceases.—*Bankhead v. Owen*, 457.
9. *Same.*—The transfer of a promissory note, given for the purchase-money of land, by delivery merely, without recourse on the vendor, or liability on his part, does not carry with it the right to enforce the vendor's lien on the land.—*Ib.* 457.
10. *Assignment of note given for rent.*—The landlord's statutory lien on his tenant's crop, for the rent of the current year (Code of 1876, §§ 3467 et seq.), exists independent of the remedy by attachment given to enforce it, and passes by an assignment of the note.—*Westmoreland & Trousdale v. Foster*, 448.
11. *Same ; assignee's remedies.*—The assignee of a note, given for the rent of land, may maintain an action for money had and received, against a purchaser of the tenant's crop, who, having bought with knowledge of his lien, has sold the crop, and received the proceeds of sale; and he may also maintain a bill in equity against such purchaser, notwithstanding his remedy at law.—*Ib.* 448.
12. *Same ; rights of reversioner and assignee.*—If, before the maturity of the note given for the rent, the reversion of the freehold has passed to another, the rent also passes to him, as an incident of the reversion, notwithstanding the assignment of the note.—*Ib.* 448.
13. *Note payable to husband, "trustee," &c.*—When a note is taken by the husband payable to himself, with the words added, "trustee for Mrs. S. J. F.," his wife, the superadded words are mere *descriptio personarum*, and are not sufficient to show that the note belongs to his wife.—*Ib.* 448.
14. *Transfer of note given for rent of wife's lands.*—A promissory note, given for the rent of the wife's lands, and payable to the husband, belongs to him, and may be transferred by him without the signature or concurrence of his wife.—*Ib.* 448.
- [ 15. *Payment of note ; when valid against assignee.*—A payment of a promissory note to the payee, made before maturity, but after the note has been assigned for valuable consideration, or made after maturity, but with notice or knowledge of the assignment, is not available as against the assignee.—*Barbour & Son v. Wash. F. & M. Insurance Co.* 433.

## BONDS.

1. *Action on bond ; non-joinder of obligors.*—Under the present statute (Code of 1876, § 2904), as under the act of 1818 (Clay's Digest, 323, § 61), joint bonds are made joint and several; and a plaintiff may, at his election, sue one, several, or all of the obligors: in an action against one or more, the non-joinder of the others is not pleadable in abatement.—*McKee v. Griffin*, 427.
2. *Official bond of register in chancery ; liability of sureties for moneys collected by him as custodian, or special receiver.*—Under our practice and laws, the duties which, in England, pertained to masters and registrars in



BONDS—*Continued.*

- chancery, are blended, and devolved on the register, and he is the proper person to be appointed the custodian, or special receiver, of a fund or choses in action in court; and for moneys received by him in that capacity, and not accounted for, the sureties on his official bond as register are responsible.—*Coleman v. Ormond*, 328.
3. *Action on replevin bond.*—An action at law may be maintained on a replevin bond, given in an action of detinue, although the bond, when properly indorsed and returned forfeited (Code of 1876, § 2945), has the force and effect of a judgment: the statutory remedy is merely cumulative.—*Masterson v. Matthews*, 260.
  4. *Notice of attachment; shown by execution of replevy bond.*—The execution of a replevy bond by the defendant, in an attachment case, is an admission of notice, and is sufficient to sustain a judgment by default at the first term (Code of 1876, § 3323), if executed twenty days before the commencement of the term.—*Peebles v. Weir*, 413.
  5. *Bastardy; bond for appearance in court.*—The statutory bond required by the justice of the peace, before whom proceedings in bastardy are instituted (Code of 1876, § 4072), is only intended to secure the defendant's appearance in court to answer the charge, and, having served its purpose when he has appeared, he can not then be heard to question its sufficiency; nor is the bond invalid, because it does not particularly describe or identify the case (§ 4853), when the affidavit and warrant, returned with it, show to what particular case it applies.—*Hann v. The State*, 100.

BURGLARY. See CRIMINAL LAW, 8-9.

CANCELLATION OF DEEDS. See CHANCERY, 3, 4, 5.

## CERTIORARI.

1. *When certiorari lies on justice's judgment.*—When a cause is removed from a justice's court by *certiorari*, it should not be dismissed, because the right of appeal was not lost when the *certiorari* was sued out: the policy of the statutes is to secure a trial on the merits, whether the cause is brought up by appeal or *certiorari*.—*Washington v. Parker*, 447.
2. *When writ lies to probate judge, and in whose favor.*—When an election is contested, without authority of law, before a probate judge, and is by him held void, a *certiorari* lies from the Circuit Court to remove and vacate the proceedings; and the writ may be sued out by persons who were made defendants to the proceeding before the probate judge.—*Clarke & Daviney v. Jack*, 271.

## CHANCERY.

## I. JURISDICTION, AND GENERAL PRINCIPLES.

1. *Award; when set aside, as unconscionable, or oppressive.*—That an award is unconscionable, or oppressive, may be good ground for setting it aside in equity, at the suit of the losing party, when he is free from all fault or negligence in the matter; but he cannot complain that it works him a wrong or injury, when he failed to adduce before the arbitrators the evidence on which he relies to show such wrong or injury.—*Brewer v. Bain*, 153.
  2. *Same; when set aside, on account of error in law.*—Errors of law, committed by arbitrators, will not vitiate an award, unless it appears that they intended to be governed by the law, and were mistaken in the application of well established principles.—*Ib.* 153.
- Cancellation of mortgage, on ground of fraud.*—If a creditor procures the execution by his debtor of a mortgage for past advances, by promising to make additional advances during the current year, the breach of this agreement on his part, although it might support an action at law, or a plea of set-off to the extent of the injury actually sustained, will not

## CHANCERY—Continued.

- support a bill in equity for the cancellation of the mortgage on the ground of fraud.—*Johnson v. Murphy, Agnew & Co.*, 288.
4. *Cloud on title; what conveyance is.*—As to a mortgage on lands, to which are signed the names of four persons to whom they belonged as joint tenants, or tenants in common, and a certificate of acknowledgment in proper form is appended, while the names were in fact all signed by one of them only, without written authority from the others, the court is "not prepared to say it does not create such a cloud on the title as that equity would entertain a bill to remove it," at the suit of the proper parties; but the defense could also be made by them at law.—*Id.* 288.
  5. *Cancellation of deed as cloud on title.*—A bill in equity for the cancellation of a deed, as a cloud on the title to lands, can not be maintained by a person who is not in possession.—*Arnett v. Bailey*, 435.
  6. *Cloud on title to homestead; when equity will remove.*—A court of equity will entertain a bill to remove a cloud from the title to a homestead exemption, as against a purchaser at execution sale, when the owner of the homestead is in possession, and can not test his title by an action at law; but this principle has no application, where the purchaser at execution sale has already brought an action at law, and has recovered a judgment in ejectment for the lands claimed.—*Jones v. DeGraffenreid*, 145.
  7. *Homestead; when asserted or defended in equity.*—When a homestead exemption has been legally claimed and allotted, the title to it is legal, and may be asserted or defended successfully in a court of law; consequently, the owner can not come into equity to assert or protect it, without showing special circumstances for the interposition of equity. *Id.* 145, (*Vide infra*, 15.)
  8. *When creditor without lien may come into equity.*—The statute which authorizes a creditor by simple contract only, without a lien, to come into equity to reach and subject property fraudulently conveyed by his debtor (Code of 1876, § 3886), applies only to property situated here, and has no extra-territorial operation.—*Lile v. Parker's Executor*, 165.
  9. *Same; jurisdiction of equity as to foreign lands.*—A foreign creditor by simple contract, having no lien, can not maintain a bill in equity here, against the voluntary grantees of his deceased foreign debtor, to make them account for foreign lands fraudulently conveyed by the debtor in his life-time. The powers of a court of equity to compel the performance of its decrees *in personam*, although the lands involved in the litigation may not be within its jurisdiction, do not extend to such a case.—*Id.* 165.
  10. *When heirs or distributees may maintain bill in equity, against debtors of estate.*—The general rule is, that neither creditors, distributees, nor legatees can maintain a bill in equity against debtors of the estate, to subject the debts to the satisfaction of their demands; and if there is an exception to this general rule, where a debtor has, by fraud or misrepresentation, induced the administrator to accept worthless notes and bonds in payment of a debt, and the administrator is insolvent, the complainants must show the existence of a debt which the administrator himself could recover.—*Dugger v. Tayloe*, 504.
  11. *Bill of conformity by administrator; when does not lie.*—An administrator can not maintain a bill of conformity against the creditors of the estate, who have obtained judgments at law against him, on the ground that the estate has become insolvent by reason of the depreciation in the value of the property generally, when it appears that, if he had exercised due diligence in the administration, the debts might have been paid before any depreciation occurred.—*Weakley v. Gurley's Admr.*, 399.
  12. *Settlement of decedent's estate; when removed into equity.*—The distributees of a decedent's estate may, at any time before proceedings for a settlement have been commenced in the Probate Court, remove the settlement into the Chancery Court, without the assignment of any special reason; but the administrator can not file a bill for that purpose, without showing the existence of some special reason for the interposition of a court of equity; and the involved and complicated condition of the affairs of

## CHANCERY—Continued.

- the estate, when caused by his own neglect and breach of duty, is not a sufficient reason to support such a bill.—*Ib.* 399.
13. *Settlement of administrator's accounts, at suit of administrator de bonis non.*—An administrator *de bonis non*, having cited his predecessor to a settlement in the Probate Court, can not afterwards have the settlement transferred to the Chancery Court, under a bill filed by him for a settlement of his own administration.—*Ib.* 399.
  14. *Decedent's estate; creditor's remedy against executor or administrator.*—The remedy of creditors of a testator or intestate, to enforce payment of their debts out of his estate, is, exclusively, in the absence of equitable circumstances, by action at law against the executor or administrator in his official character; and the same principle applies to creditors of another person, whose debts are by the will charged on the testator's estate.—*Harkins v. Hughes*, 316.
  15. *When equity will enjoin ejectment.*—A court of equity will not, in the absence of some special equity, enjoin the prosecution of an action of ejectment; nor will it interfere, where the title asserted by each party is of legal cognizance; as where the plaintiff sues to recover land which he claims as his homestead, and the defendant insists that his right of homestead exemption has been waived and forfeited.—*Shaw & Cox v. Lindsey*, 345.
  16. *Same.*—Authorities cited on the question, in what extreme cases a court of equity will, by injunction, stop further litigation after judgment in ejectment.—*Jones v. DeGraffenreid*, 145.
  17. *Equitable relief against judgment.*—An administrator, having allowed creditors to obtain judgments at law against him, can not obtain equitable relief against such judgments, on an averment that they were rendered upon "an agreement and understanding that no effort was to be made to charge him personally, or to charge the sureties upon his bond, with the amount of such judgments."—*Weakley v. Gurley's Adm'r*, 399.
  18. *Money paid under mistake; remedy at law and in equity.*—A bill in equity does not lie to recover money paid under a mistake, either of fact or of law: if paid under a mistake of fact, an action at law is the appropriate and only remedy; and if under a mistake of law, it can not be recovered at all, either at law or in equity.—*Lesslie v. Richardson*, 563.
  19. *Partition of lands in equity.*—A court of equity will entertain a bill for the partition of lands, at the suit of one joint tenant, or tenant in common, who shows a clear title to an undivided interest therein.—*Arnett v. Bailey*, 435.
  20. *Public officers; jurisdiction of equity, in matter of accounts of.*—A court of equity will not entertain a bill, at the suit of the State, against a public officer who has given an official bond for the performance of his duties—*e. g.*, a county superintendent of education—to compel a settlement of his accounts, or the correction of errors in a settlement already made with the proper officer, on the ground that he is a trustee; nor on the ground of fraud, because, on said settlement, by fraud or collusion, he used vouchers which had been used on former settlements, and thereby procured the allowance of credits to which he was not entitled; nor on the ground that the accounts are complicated. The remedy at law is full, adequate, and exclusive.—*The State v. Bradshaw*, 239.
  21. *Subrogation of creditor to rights of surety, under mortgage given by principal debtor.*—When a debtor executes a mortgage, or deed of trust, for the declared purpose of securing his accommodation indorsers; authorizing the trustee to sell the lands, if he "should make default in paying said debt at maturity, and with the proceeds pay said bill of exchange," &c.; the deed enures to the benefit of the creditor, although it was executed without his knowledge: his acceptance of its provisions will be presumed, and he may enforce it against a purchaser with notice.—*McMullen v. Neal's Adm'r*, 552.
  22. *Same; entering satisfaction of mortgage; when purchaser is chargeable with notice.*—When a mortgage, or deed of trust, is executed by a debtor with the declared purpose of securing his sureties, but in terms which make



## CHANCERY—Continued.

- it enure to the benefit of his creditor, and it is duly recorded; the sureties can not, while the debt remains unpaid, impair the rights of the creditor, by entering satisfaction, or directing the trustee to enter satisfaction, on the record of the deed; and a purchaser from the debtor, after such entry of satisfaction, is chargeable with notice of the creditor's rights under the deed.—*Ib.* 552.
23. *When cestui que trust can not come into equity.*—When the legal title to lands is vested in a trustee, the *cestui que trust* can not maintain a bill in equity against an adverse holder, to recover possession, without an averment that the trustee refuses to sue at law.—*Arnell v. Bailey*, 435.
  24. *Resignation of trustee; withdrawal of, and subsequent sale.*—A trustee with power of sale, appointed by a deed given to secure the payment of a debt, having tendered his resignation to the register in chancery, as provided by law (Code of 1876, § 3727), may nevertheless withdraw it, at any time before final action has been taken on it by the register, and execute the power of sale conferred by the deed.—*Dillard & Wife v. Winn*, 285.
  25. *Duty and liability of trustee.*—Infallibility is not exacted of trustees: they form their best judgment in the light of existing facts, and, if they act in good faith, they are not responsible for results which could not have been foreseen by ordinary vigilance and prudence.—*Lyon v. Foscutt*, 469.
  26. *Same.*—To relieve a trustee from liability for the failure to collect moneys which he might have collected, he must show something more than a simple mistake in the calculation of interest.—*Ib.* 469.
  27. *Compensation of trustee.*—On the facts of this case, the trustee was held entitled, in addition to commissions on his annual receipts and disbursements to the tenant for life, to reasonable compensation for his services, trouble, and risk in collecting, investing, and managing the trust funds during the late civil war, when the responsibilities of his office were greatly increased by the anomalous condition of affairs, of which the court takes judicial notice.—*Ib.* 469.
  28. *Solicitor's fees, and costs.*—This being the settlement of a trust, under a bill filed by the beneficiaries against the trustee, the litigation being protracted, and some of the contested items of account being decided against each party, the solicitor's fees and the costs were equally divided among the trustee, the beneficiary of the life-estate, and the remaindermen, one third to be paid by each.—*Ib.* 469.
  29. *Vendor's lien, and against whom asserted.*—The principle must be regarded as settled in Alabama, that, in the absence of an agreement to the contrary, the vendor retains a lien on the land for the unpaid purchase-money, although he has conveyed by absolute deed, reciting therein that the purchase-money has been paid; which lien will be enforced against all persons, except a *bona fide* purchaser without notice.—*Bankhead v. Owen*, 457.
  30. *Same; when passes by transfer of note.*—The transfer of a promissory note, given for the purchase-money of land, by delivery merely, without recourse on the vendor, or liability on his part, does not carry with it the right to enforce the vendor's lien on the land.—*Ib.* 457.
  31. *Vendor's lien; how affected by statute of limitations.*—A vendor's equitable lien for the unpaid purchase-money of land is not lost or destroyed, because the statute of limitations has barred an action at law on the notes for the purchase-money; and this principle applies where he has conveyed the land by absolute deed, taking no mortgage or other security, as well as where he has retained the title, and executed only a bond for title. (MANNING, J., dissenting.)—*Bizzell v. Nix*, 281.
  32. *Sale of land by administrator, under probate decree; vendor's lien, as against sub-purchaser.*—A sub-purchaser of lands sold by an administrator under a probate decree, who contracts with the original purchaser for a portion of the lands, is not a debtor of the administrator, nor of the estate: if the administrator or heirs attempt to subject the lands so bought by him to the payment of the original purchase-money, an equity at once arises in his favor to have the other lands first subjected; and if the heirs

## CHANCERY—Continued.

- have released the original purchaser from all liability on account of his purchase, with a reservation of the right to assert against the sub-purchaser their title to the lands bought by him, they can not assert against him a vendor's lien for any portion of the original purchase-money.—*Dugger v. Tayloe*, 504.
33. *Waiver of vendor's lien*.—Where the purchaser died, not having paid the purchase-money, and the land was sold by his administrator under a decree of the Probate Court; and the vendor afterwards accepted from the purchaser at that sale, in satisfaction of his claim against the land, a draft on a third person, surrendered the note given for the purchase-money, and collected a part of the money on the draft in Confederate currency; held, that these facts proved a waiver and relinquishment of the vendor's lien.—*Thames v. Caldwell et al.*, 644.
34. *Landlord's lien for rent; remedies of assignee of note*.—The assignee of a note, given for the rent of land, may maintain an action for money had and received, against a purchaser of the tenant's crop, who, having bought with knowledge of his lien, has sold the crop, and received the proceeds of sale; and he may also maintain a bill in equity against such purchaser, notwithstanding his remedy at law.—*Westmoreland & Trousdale v. Foster*, 449.

## II. PLEADING AND PRACTICE.

35. *Misjoinder of complainants*.—When several persons unite as complainants in a bill in equity, all must be entitled to relief, or none can obtain it.—*Hutton v. Williams*, 107; *Johnson v. Murphy, Agnew & Co.* 288.
36. *Sufficiency of demurrer; dismissal for want of equity*.—When a bill is wanting in equity, it may be dismissed by the court on that account, even though no demurrer be interposed, or be defective in the specification of causes; and if dismissed on demurrer, though the demurrer be defective, this court will not reverse, unless the record shows that the complainant offered to remedy the defects of the bill by amendment.—*Lesslie v. Richardson*, 563.
37. *Filing demurrer after answer*.—When a demurrer is not incorporated in the answer, as authorized by the statute (Code of 1876, § 3783), it is irregular to file it afterwards without leave of the court, and, if so filed, it may be struck from the files on motion; but, under the liberal statute of amendments (§ 3790), the court would be bound, on application, to allow the demurrer to be incorporated in the answer at any time before final decree; and proceeding to a hearing on the demurrer, without objection, is a waiver of the irregularity.—*Shaw & Cox v. Lindsey*, 344.
38. *Cross-bill*.—When a bill is filed by creditors of a decedent's estate, which has been declared insolvent, against the personal representative, and against persons who have purchased the lands from him, charging a devastavit by them, and seeking to have the lands sold for the payment of the purchase-money alleged to be unpaid; the widow, being made a defendant as a legatee under the will, can not maintain a cross-bill for an assignment of dower in the lands.—*Shelton v. Carpenter*, 201.
39. *When cross-bill must contain equity*.—When a cross-bill sets up matters in defense only of the original bill, it is not necessary that such matters should be of equitable cognizance, as distinguished from legal demands; but, when it seeks relief as to independent matters outside of the case made by the original bill, except by way of set-off, it must show some ground of equitable jurisdiction.—*Winn v. Dillard*, 369.
40. *Issue at law*.—When a question of fact arising in a chancery cause, as of fraud *vel non* in the execution of a deed, is submitted by the chancellor to the decision of a jury, he is not concluded by their verdict; and although he may approve it, and make it the basis of his decree, this court will not be controlled by it, when satisfied from the record that the jury did not arrive at a correct conclusion—that the verdict was formed under a misapprehension of the pleadings, or that it is plainly opposed to the evidence, when considered in connection with the pleadings.—*Marshall v. Croom*, 121.

## CHANCERY—Continued.

41. *Rules of practice, on statement of guardian's accounts by register.*—On the settlement of a guardian's accounts in equity, the register should be directed to observe the mode of proceeding on similar settlements in the Probate Court, so far as practicable and consistent with the rules of chancery practice.—*Hutton v. Williams*, 133.
42. *Power of chancellor, at subsequent term, to set aside final decree.*—A chancellor has no power to set aside and vacate, at a subsequent term, of his own motion, a final decree rendered at a former term, although matters of account in the cause are still pending under a reference to the register.—*Ex parte Cresswell*, 378.
43. *Conclusiveness of decree in chancery, affirmed on appeal.*—A decree in a chancery cause, rendered on final hearing on pleadings and proof, as to the relative priority of two mortgages, having been affirmed by this court on appeal, the question of priority is definitely settled in the cause, and can not be re-opened, by petition filed in the court below by one of the parties, on grounds not presented on the former hearing.—*Marlowe & Wife v. Benagh*, 323.
44. *Conclusiveness of decree on appeal.*—When this court, on appeal in a chancery cause, partly affirms, and partly reverses the chancellor's decree, and remands the cause "for further proceedings not inconsistent with" the opinion filed, the chancellor is concluded by the decree of this court, and can not in any manner change that part of his former decree which was here affirmed.—*Lyon v. Foscue*, 468.
45. *When appeal lies from chancery decree.*—A decree in a chancery cause, in favor of a special administrator *ad litem*, against the administrator in chief, each in his representative capacity, is a decree in favor of the estate, against the estate: is a nullity, there being no adverse interests or parties, and no appeal lies from it.—*Ex parte Lyon*, 650.

## CHANGE OF VENUE.

1. *What record must show.*—To sustain a judgment of conviction in a criminal case, in a county other than that in which the indictment was found, the record must show a valid order transferring it, made by the court in which the indictment was found: a written agreement, signed by several attorneys, and copied into the transcript, consenting to the transfer of causes "which by law have to be, and which may be transferred," and waiving "the formal certificate of transfer of said cases," is not sufficient, when the record does not show that the defendant's case was embraced in the agreement, and he had not been arrested when the agreement was made.—*Goodloe v. The State*, 93.
2. *Destruction of certified transcript, and how supplied.*—On change of venue in a criminal case (Code of 1876, §§ 4914-16), if the certified transcript should be lost or destroyed, after it has been filed in the court to which the trial was removed, that court may supply the loss, and substitute another transcript, on proper evidence, as in the loss or destruction of any other paper or record; it is not necessary that the substituted transcript should be made out in return to a *certiorari*, nor that it should be specially certified as the former was: if its truth is not controverted, and the court is satisfied of its correctness, it is sufficient.—*Dunn v. The State*, 35.
3. *Change of venue on account of incompetency of presiding judge of circuit.*—When application for a change of venue in a criminal case, on account of the incompetency of the judge of the circuit to preside, is made in vacation, under the provisions of the act approved January 26, 1875, and is refused by him, on the ground that he has made arrangements with the judge of the adjoining circuit to preside in his place at the next term; this furnishes no reason why the presiding judge at the next term, not being disqualified to sit in the cause, should continue it, or decline to try it.—*Payne v. The State*, 80.
4. *Same.*—The act approved January 26, 1875, entitled "An act to provide for a change of venue in certain cases" (Sess. Acts 1874-5, p. 231), is superseded and repealed by the constitutional provision on the same subject, contained in the 18th section of the 6th article.—*Ib.* 80.



## CHARGE OF COURT TO JURY.

1. *Abstract charge*.—A charge requested, which is based, partly or entirely, on a fact of which there does not appear to have been any evidence whatever, is abstract, and properly refused on that account.—*Glenn v. The State*, 104.
2. *Same*.—To authorize a reversal on account of an abstract charge, the record must show that it misled the jury, to the prejudice of the appellant.—*Hammett v. Brown*, 499.
3. *How construed*.—Instructions to the jury must be construed in connection with the evidence; and if, when so construed, they are correct, their incorrectness, as applied to a different state of facts, is not a reversible error.—*Ib.* 499.
4. *Charge withdrawing evidence from jury*.—A charge requested, which withdraws from the consideration of the jury any evidence, however weak or inconclusive it may be, may properly be refused.—*Ib.* 499.
5. *Charge referring construction of deeds to jury*.—It is the duty of the court to construe deeds, or other written instruments offered in evidence; and a charge which refers their construction to the jury is erroneous.—*Bernstein v. Humes*, 582.
6. *Charge misleading jury*.—A charge which is indefinite, or has a tendency to mislead the jury, is properly refused.—*Ib.* 532.
7. *Same*.—A charge which is calculated to mislead the jury, but not otherwise objectionable, is not a reversible error: the party objecting to it should ask an explanatory charge.—*McCrary's Adm'r v. Rash's Adm'r*, 374.
8. *Charge requiring explanation*.—A charge given by the court, which asserts a correct proposition of law, but, under some tendencies of the evidence, requires an additional explanatory charge, is not a reversible error: it is the duty of the party complaining of it to ask the proper explanatory charge.—*Chapman v. Holding*, 523.
9. *Blank forms of verdict for jury*.—The practice has long prevailed of instructing the jury orally, as to the proper form of verdict, and it is unobjectionable; nor is it erroneous to give them blank forms in writing, to be used according to their finding on the facts.—*Ib.* 523.
10. *Verdict against charge of court*.—That the jury, by their verdict, have disregarded the charge of the court, is not error, but is good matter for a motion for a new trial; and the ruling of the primary court on such motion is not revisable on error.—*Ib.* 523.
11. *Error without injury in charge to jury*.—When the bill of exceptions shows that the plaintiff, on the trial below, proved a clear legal title in himself, entitling him to recovery, the judgment in his favor will not be reversed, because the court instructed the jury that an equitable title would support his action.—*Wood v. Montgomery*, 500.
12. *Charge as to sufficiency of evidence*.—In a civil cause, a mere preponderance of evidence is not sufficient to authorize a verdict for the plaintiff, unless it is sufficient to satisfy the minds of the jury; but a charge asked, asserting "that a preponderance of evidence merely, inclining the minds of the jury to sustain the plaintiff's claim, can not be regarded as sufficient," is calculated to mislead the jury, and is properly refused.—*Acklen's Adm'r v. Hickman*, 568.
13. *Same*.—In civil cases, where the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof; and a mere preponderance of the evidence, when it produces a reasonable conviction in the minds of the jury, is sufficient to sustain a verdict; but it is error to instruct the jury, as matter of law, either that they must find according to the preponderance of the evidence, or that they can not so find.—*Vandeventer & Co. v. Ford & Moseley*, 610.
14. *Charge referring legal question to jury*.—A charge which refers the decision of a legal question to the jury—*e. g.*, the sufficiency of the excuse of a witness for failing to appear before the grand jury—is erroneous.—*Drake v. The State*, 62.

## CODE OF ALABAMA (1876).

1. § 1. Meaning of words.—*Bickley v. Keman & Co.*, 293.
2. §§ 302-41. Contesting elections.—*Clarke & Daviary v. Jack*, 271.
3. § 1336. Certificate of notary public.—*Bradley v. Northern Bank of Alabama*, 252.
4. § 1632. Who may be appointed overseer of public road.—*Allison v. The State*, 54.
5. § 1644. Resignation of overseer of public road.—*Allison v. The State*, 54.
6. § 2121. Statute of frauds, as to contracts required to be in writing.—*Locke v. Humphries*, 117; *Lavender v. Hall*, 214.
7. § 2145. When witnesses to deed are necessary.—*Lavender v. Hall*, 214.
8. §§ 2238-9. Widow's quarantine.—*Beaugh v. Tarrentine*, 557; *Oylbourne v. Oylbourne's Adm'r*, 616.
9. § 2447. Sale of lands by administrator for payment of debts.—*Arnett v. Bailey*, 435.
10. § 2468. Sale of lands by administrator for equitable division.—*Dagger v. Tayloe*, 504.
11. § 2509. Filing list of heirs by administrator.—*Hutton v. Williams*, 107.
12. § 2516. Proof of credits by administrator.—*Hutton v. Williams*, 133.
13. § 2568. Filing claims against insolvent estate.—*Shelton's Adm'r v. Poulson's Adm'r*, 578.
14. § 2585. Contribution between creditors of insolvent estate.—*Shelton v. Carpenter*, 201.
15. § 2625. Appointment of administrator *ad litem*.—*Ex parte Lyon*, 650.
16. § 2705. Wife's statutory separate estate.—*Castleman v. Jeffries*, 380.
17. § 2707. Conveyance of wife's separate property.—*Logwood v. Hussey*, 417.
18. § 2714. Husband's distributive interest in wife's estate.—*Broun v. Grimes*, 648.
19. § 2793. Proof of credits by guardian.—*Hutton v. Williams*, 133.
20. § 2849. Judgment on note waiving exemption.—*Brown v. Leitch*, 313.
21. § 2881. Redemption of real estate.—*Posey v. Pressley*, 243.
22. § 2904. Action by or against partnership.—*Moore & McGee v. Burns & Co.*, 269.
23. § 2942-3. Forthcoming bond in detainee.—*Musterson v. Matheers*, 260.
24. §§ 2962-3. Plea of not guilty in ejectment.—*Bernstein v. Hanes*, 582.
25. § 2969. Conclusiveness of judgment in ejectment.—*Jones v. DeGraffenreid*, 145.
26. §§ 2987, 2990. Form of pleas.—*Day v. Huckabee*, 425.
27. § 3038. Action by partnership; statement of partners' names.—*Moore & McGee v. Burns & Co.*, 269.
28. § 3045. Proof of foreign statutes by printed volume.—*Bradley v. Northern Bank of Alabama*, 252.
29. § 3058. Testimony of party as witness, in action by or against administrator.—*Smith's Adm'r v. Bryant's Adm'r*, 235; *McCrary's Adm'r v. Rash's Adm'r*, 374.
30. §§ 3161-3. Rehearing after final judgment at law.—*Ex parte Wallace*, 267; *Ex parte Johnson & Seals*, 429.
31. § 3209. Sale of equity of redemption, or perfect equity, under execution.—*Shaw & Cox v. Lindsey*, 344.
32. § 3323. Notice of attachment.—*Peebles v. Weir*, 413.
33. § 3467. Landlord's lien, and remedies.—*Lavender v. Hall*, 214; *Smith's Adm'r v. Bryant's Adm'r*, 235; *Ellis v. Martin*, 391; *Lomax v. LeGrand & Co.*, 537; *Westmoreland & Translate v. Foster*, 448.
34. §§ 3497-3507. Partition of lands among joint owners.—*Stimpson v. Malone & Pote*, 338.
35. § 3705. Limitation of action for unlawful detainer of lands.—*Posey v. Pressley*, 243.
36. § 3727. Resignation of trustee.—*Dillard & Wife v. Winn*, 285.
37. § 3790. Amendments in chancery.—*Shaw & Cox v. Lindsey*, 344.
38. § 3886. When creditor without lien may come into equity.—*Lide v. Parker's Executor*, 165.
39. §§ 3918, 3925. Appeal from interlocutory chancery decree; to what term taken.—*Winn v. Dillard*, 369.

CODE OF ALABAMA (1876)—*Continued.*

40. §§ 4071-80. Prosecution for bastardy.—*Hanna v. The State*, 100.
41. § 4136. Defaulting witness before grand jury.—*Drake v. The State*, 62.
42. § 4137. Resisting officer in execution of process.—*Jones v. The State*, 99.
43. § 4218. Vagrancy and prostitution.—*Toney v. The State*, 97.
44. § 4295. Statutory degrees of murder.—*Mitchell v. The State*, 26; *Washington v. The State*, 10.
45. § 4314. Assault with intent to murder.—*Meredith v. The State*, 441.
46. § 4353. Removing or selling mortgaged property.—*Glenn v. The State*, 104.
47. § 4358. Larceny of horse, cow, hog, &c., or part of outstanding crop.—*Harris v. The State*, 50; *Adams v. The State*, 52; *Lavender v. The State*, 60.
48. § 4370. Obtaining money by false pretenses.—*Sandy v. The State*, 58.
49. § 4419. Trespass after warning.—*Sandy v. The State*, 18; *Daniels v. The State*, 56.
50. §§ 4453, 4484. Whether court or jury fix punishment.—*Drake v. The State*, 42.
51. § 4765. Oath of petit jury.—*Commander v. The State*, 1; *Perkins v. The State*, 7; *Washington v. The State*, 10; *Allen v. The State*, 19; *Atkins v. The State*, 45.
52. § 4784. Caption of indictment.—*Overton v. The State*, 73; *Goodloe v. The State*, 93.
53. § 4785. Sufficiency of indictment in statement of offense.—*Glenn v. The State*, 104; *Toney v. The State*, 97; *Pickett v. The State*, 77; *Horton v. The State*, 72; *Drake v. The State*, 62; *Lavender v. The State*, 60.
54. § 4788. Statement of time in indictment.—*Atkins v. The State*, 45; *Harris v. The State*, 50; *Adams v. The State*, 52.
55. §§ 4796-7. Alternative averments in indictment.—*Horton v. The State*, 72; *Pickett v. The State*, 77.
56. § 4800. Averment of ownership of stolen property.—*Harris v. The State*, 50.
57. § 4849. Bail in criminal cases.—*Callahan v. The State*, 65.
58. § 4870. Refusing to plead to indictment.—*Daniels v. The State*, 56.
59. §§ 4914-16. Change of venue.—*Dunn v. The State*, 35.
60. §§ 4958-68. Proceedings on petition for *habeas corpus*, in criminal case.—*Callahan v. The State*, 65.

## COMMON LAW.

1. *Presumption as to existence of, elsewhere.*—The presumption, in which the courts of this State indulge, as to the existence of the common law in other States having the same common origin, does not apply to Texas, whose origin was different.—*Castleman v. Jeffries*, 380.
2. *Common law and English statutes; how far of force here.*—The ancient common law of England, in its entirety, never prevailed here, but only such parts of it as were not inconsistent with our institutions and public policy, as adduced from statutory and constitutional provisions; and English statutes, enacted prior to the immigration of our ancestors to this country, prevailed to the same extent, as a part of that common law.—*Nelson v. McCrary*, 301.
3. *Same.*—The statute of 13th Edw. 1, ch. 18, which gave a judgment creditor a writ of *elegit* against his debtor's lands, was in force here, as a part of the common law, during the five years of organized government which preceded its re-enactment in substance by the act of 1807 (Clay's Digest, 199, § 1).—*Id.* 301.
4. *Liability of lands for debts, at common law, and by foreign statute.*—By the old common law of England, lands could not be subjected by legal process to the payment of simple debts; and the courts of Alabama can not judicially know how far this principle has been changed by statute in Mississippi.—*Lide v. Parker's Executor*, 165.



## CONFEDERATE STATES.

1. *Payment in Confederate currency, or in notes on third person.*—A payment in Confederate currency, during the late war, on a debt payable in good money, can not be scaled at the instance of the creditor, and reduced to its real value at the time; and on the same principle, a payment in notes on third persons, made and received at their face value as a partial payment only, can not be treated, at the will of the debtor, as a payment in full, because the debt was payable in Confederate money, and the notes were worth in gold more than the entire debt in that currency.—*Hill's Adm'r v. Erwin & Jones*, 341.
2. *Contracts payable in Confederate currency; measure of recovery.*—The principle is now firmly settled (and the court adheres to it as an equitable solution of a troublesome question, though it is difficult to reconcile it with established principles), that the measure of recovery on contracts for the purchase of property, made during the late war, and understood to be payable in Confederate currency, is the value of the property in good money at the time the contract was made.—*Ib.* 341.
3. *Same; computation of partial payments.*—In an action on a note given for the purchase of property during the late war, with the understanding that it might be paid in Confederate currency, a partial payment having been made in that currency, the ratio between the nominal amount of the note, with interest to the time of the partial payment, and the unpaid balance, is also the ratio between the actual value of the property at the time of the purchase, with interest, and the balance still due in good money; to which balance, thus ascertained, interest must be added.—*Ib.* 341.
4. *Payment to executor in Confederate treasury-notes.*—An executor or administrator, having sold property during the late war, had power to receive payment of the purchaser's note, before maturity, in treasury-notes of the Confederate States.—*Shelton v. Carpenter*, 201.
5. *Allowance to guardian for board, clothing, &c.; investment in Confederate bonds.*—Where the guardian, instead of lending out or investing the funds of his ward, which were in his hands at the commencement of the war, and hiring out the negroes, retained and used the money for his own benefit, and became himself the hirer of the slaves, he can not be allowed, in extinguishment of the debt thus incurred, to claim credits for board, clothing, and tuition of his ward, at Confederate prices; nor had he any authority to fund such debt in Confederate bonds for his ward.—*Hutton v. Williams*, 133.

## CONFLICT OF LAWS.

1. *As to rights of property, real and personal.*—Real property, as to its title, descent, and the forms necessary to be observed in its conveyance, is governed by the laws of the country in which it is situated; but personal property follows the domicile of the owner.—*Castleman v. Jeffries*, 380.
2. *Foreign laws; how administered here.*—The acknowledged rule of comity, which requires that full effect shall be given by our courts to foreign laws, when, by change of domicile, or removal of property, the legality of transactions had under those laws is brought before our tribunals, is always subject to the fundamental condition, that the foreign law does not contravene the positive law or public policy of our own State.  
*Ib.* 380.

See, also, EXEMPTIONS.

## CONSTITUTIONAL LAW.

1. *Local law; preliminary notice; recitals of legislative journals.*—Although the constitution, by the 21th section of the 4th article, requires that notice shall be given of the intention to apply for the passage of a local law, it does not require that the journals shall affirmatively show that

## CONSTITUTIONAL LAW—Continued.

- such notice was proved to have been given; consequently, when the journals are silent, the courts will presume, in favor of the validity of a local law, when signed by the presiding officer of each house, and approved by the governor, that proof was made of the preliminary notice.—*Walker v. Griffith*, 361.
2. *Same*.—As to notice of the intention to apply for the passage of a local law, required by the 24th section of the 4th article of the constitution, it is not necessary for the legislative journals to show that it was given: the courts will presume that it was given, unless the journals affirmatively show the contrary.—*Clarke & Daviney v. Jack*, 271.
  3. *Same*.—An act to authorize the people of a particular county to vote on the question of removing the county-site, and to permanently locate the same according to their vote, is not a "special or local law for the benefit of individuals or a corporation," as those terms are used in the 23d section of the 4th article of the constitution; and whether the object of such a law can or can not be provided for by a general statute, within that provision of the constitution, is a question of legislative discretion, and not of judicial determination.—*Ib.* 271.
  4. *Law submitting change of county-site to vote of people*.—A special statute, authorizing the people of a particular county to vote on the question of removing the county-site, and providing that the same shall be permanently located according to their vote, is not an improper delegation of legislative powers to the people, nor violative of any constitutional provision.—*Ib.* 271.
  5. *Legislative rules of proceeding in passage of bills; recitals of legislative journals*.—Although the constitution, by the 21st section of the 4th article, requires that bills shall be read three times in each house on different days, it does not require that the journals of the two houses shall affirmatively show that this was done; nor is it necessary to the validity of a law that the journals should show the fact.—*Walker v. Griffith*, 361.
  6. *Act to change boundary line between counties of Blount, Walker, and Jefferson, and authorize removal of county-seat of Blount; constitutionality of, as to title and subject-matter*.—The act approved February 8, 1877, entitled "An act to change the boundary line between the counties of Blount, Walker, and Jefferson, and to authorize the removal of the county-seat of Blount county" (Sess. Acts 1876-7, pp. 229-31), is not violative of the constitutional provision contained in the 2d section of the 4th article, which declares, "Each law shall contain but one subject, which shall be clearly expressed in its title."—*Ib.* 361.
  7. *Private legislative act, appointing trustee to execute trust created by deed, in which infants are beneficiaries*.—A private statute, appointing a trustee to execute a trust created by deed, in which infants are interested as beneficiaries, and authorizing him to settle with the acting trustee, and to execute all the powers conferred by the deed on the original trustee (enacted at the instance of the acting trustee and most of the adult beneficiaries), is not an invasion of judicial power by the legislature, but a legitimate exercise of their own appropriate functions; and its validity is not affected by the fact that, at the time of its enactment, the acting trustee had filed his accounts for settlement in the court by which he was appointed, and asked to be discharged, and proceedings under his petition were still pending.—*Tindal v. Drake*, 170.
  8. *Trial by jury; constitutionality of law authorizing waiver of*.—The constitution of Alabama, while declaring that "the right of trial by jury shall remain inviolate," and that the defendant, "in all prosecutions by indictment," shall be entitled to a "speedy public trial by an impartial jury," also declares that the legislature may provide for the prosecution of misdemeanors before justices of the peace, thereby dispensing with a trial by jury; hence, a statute which authorizes a waiver of a trial by jury in such cases, the prosecution being commenced by indictment, and transferred to an inferior court, is not unconstitutional.—*Connelly v. The State*, 89.

See, also, EXEMPTIONS.

## CONTESTED ELECTIONS.

1. *Contest of election.*—The act approved January 24, 1877, entitled "An act to authorize the people of Franklin county to vote on the question of removing the county-seat of said county, and to permanently locate the same" (Sess. Acts 1876-7, pp. 185-9), makes no provision for a contest of the election to be held under it; and the provisions of the general election law, regulating contested elections (Code of 1876, §§ 302-41), being confined to the election of persons to office, are not applicable to said election; consequently, there is no statutory provision for a contest of such election.—*Clarke & Daviney v. Jack*, 271.
2. *When certiorari lies to probate judge, and in whose favor.*—When an election is contested, without authority of law, before a probate judge, and is by him held void, a *certiorari* lies from the Circuit Court to remove and vacate the proceedings; and the writ may be sued out by persons who were made defendants to the proceeding before the probate judge. *Ib.* 271.

## CONTRACTS.

1. *Relevancy of evidence, as to terms of contract.*—In an action to recover damages for the breach of a special contract, for the purchase of a fence ordered by plaintiffs for defendants, and which defendants refused to receive because it was not made altogether of iron, the fact that defendants, after their refusal to receive the fence ordered by plaintiffs, "actually purchased an iron fence, and the amount paid for it," are not relevant and admissible evidence for defendants.—*Vandeveenter & Co. v. Ford & Moseley*, 610.
2. *Contracts payable in Confederate currency; measure of recovery.*—The principle is now firmly settled (and the court adheres to it as an equitable solution of a troublesome question, though it is difficult to reconcile it with established principles), that the measure of recovery on contracts for the purchase of property, made during the late war, and understood to be payable in Confederate currency, is the value of the property in good money at the time the contract was made.—*Hill's Adm'r v. Erwin & Jones*, 341.

## CORPORATIONS.

1. *Action by foreign corporation; amendment of complaint in averment of plaintiff's corporate character.*—In an action by a foreign corporation, if the complaint does not aver the plaintiff's corporate character, the cause should not be struck from the docket on that account, but an amendment should be allowed to supply the defect.—*Southern Life Insurance Co. v. Roberts*, 431.
2. *Municipal corporation; when action lies against, for injuries caused by defective streets or side-walks.*—To render a municipal corporation liable, in a civil action, for special injuries caused by defective streets or side-walks, it is not necessary that the duty of keeping its streets and side-walks in repair shall be expressly enjoined by its charter, or any other public statute: the duty and liability arise, when the charter confers express power to open, improve, repair, and keep the streets, &c., in safe condition for travel, and additional power to raise the necessary funds for that purpose, by taxation or assessments; and an action lies in favor of a person who is injured by the neglect of this duty, when he did not bring the accident upon himself by his own culpable negligence, and the defect in the street or side-walk had existed, within observation by the people generally, for such length of time as must have enabled it to be known.—*Albrittin v. Mayor and Aldermen of Huntsville*, 486.
3. *Judicial notice of charter.*—The charter of a municipal corporation is a public statute, of which the courts will take judicial notice.—*Ib.* 486.



## COSTS.

1. *In chancery, on settlement of trust.*—This being the settlement of a trust, under a bill filed by the beneficiaries against the trustee, the litigation being protracted, and some of the contested items of account being decided against each party, the costs were equally divided among the trustee, the beneficiary of the life-estate, and the remainder-men, one-third to be paid by each.—*Lyon v. Foscoe*, 469.
2. *On petition for prohibition.*—The costs of the application in this case were adjudged against the plaintiff in the decree ordered to be vacated, who was a special administrator, and who was left to pursue whatever remedy he might have against the estate in another proceeding.—*Ex parte Lyon*, 650.

## COUNTY.

1. *Judicial notice of counties.*—This court takes judicial notice of the names of all the counties in the State, and knows there is no county named *Wadison*.—*Overton v. The State*, 73.
2. *Act to change boundary line between counties of Blount, Walker, and Jefferson, and authorize removal of county-seat of Blount; constitutionality of, as to title and subject-matter.*—The act approved February 8, 1877, entitled "An act to change the boundary line between the counties of Blount, Walker, and Jefferson, and to authorize the removal of the county-seat of Blount county" (Sess. Acts 1876-7, pp. 229-31), is not violative of the constitutional provisions contained in the 2d section of the 4th article, which declares, "Each law shall contain but one subject, which shall be clearly expressed in its title."—*Walker v. Griffith*, 361.

## CRIMINAL LAW.

## APPEAL.

1. *When appeal lies.*—A criminal case can not be brought to this court by appeal, on bill of exceptions, while a motion for a new trial is pending, the judgment being suspended until the decision of the motion.—*Overton v. The State*, 73.

## ASSAULT WITH INTENT TO MURDER.

2. *Constituents of offense.*—An assault with intent to murder, though made a felony by statute, is a common-law offense, the necessary ingredients of which are unchanged by the statute increasing the punishment: an intentional attempt by violence, without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicating an intent to take his life, constitutes the offense.—*Meredith v. The State*, 441.
3. *Same; intent.*—It is not necessary to prove a specific intent, as contradistinguished from an intent to be implied by the jury from the attendant circumstances: as in cases of murder, the intent must, of necessity, generally be inferred by the jury from the character of the assault, the use of a deadly weapon, and the absence of excusing or palliating circumstances.—*Ib.* 441.
4. *Same.*—Whether the intended offense, if consummated, would be murder in the first or in the second degree, is an immaterial inquiry, since there were no degrees in murder at common law; and the court may properly refuse a charge which requires the jury to determine that question.—*Ib.* 441.

BAIL. See that Title.

## BAWDY HOUSES.

5. *Keeping bawdy-house; what constitutes offense, and evidence of.*—Under an indictment for keeping a bawdy-house, evidence of the general reputa-

CRIMINAL LAW—*Continued.*

tion of the inmates of the house, but not of the house itself, is admissible for the prosecution; and it must be shown that the defendant governed or managed the house, or assisted in its government and management: it is not enough to show that she resided in the house for the purposes of prostitution.—*Toney v. The State*, 97.

6. *Same*, and vagrancy; sufficiency of indictment.—A count which charges that the defendant "did keep a certain house of ill fame, then and there resorted to for the purpose of public prostitution and lewdness," sufficiently charges the common-law offense of keeping a bawdy-house; and a count which charges that she "was a common prostitute, or the keeper of a house of prostitution, and had no honest employment, whereby to maintain herself," sufficiently charges the statutory offense of vagrancy (Code of 1876, § 4218); but a count which simply charges that she "was a common prostitute, or the keeper of a house of prostitution," without more, is not a sufficient charge of any offense.—*Ib.* 97.
7. *Same*; evidence.—Under an indictment for vagrancy as a common prostitute, or keeper of a house of prostitution, having no honest employment whereby to maintain herself, evidence of the reputation of the house in which the defendant lived is not admissible for the prosecution; nor is the bad character of the defendant admissible, in the first instance, as a fact showing that she was a common prostitute; but it may be shown that she resided in a house kept for prostitution, and was there visited by lewd and disorderly persons, and that her associates were persons of ill repute; and these facts being proved, she may, in rebuttal, prove that her health and physical condition rendered prostitution improbable, if not impossible.—*Ib.* 97.

## BURGLARY.

8. *Description of building burned; alternative averments.*—In an indictment for burglary, a count which describes the building burned as "a barn or stable," or as "a barn, house, or building," is fatally defective on demurrer.—*Horton v. The State*, 72.
9. *Same.*—An indictment for breaking and entering a store-house, "in which goods, merchandise, or other valuable thing, was kept for use," &c., is fatally defective on demurrer: it should describe the "other valuable thing," so that the court may determine whether it falls within the statute, and the prisoner be informed of the charge against him.—*Pickett v. The State*, 77.

CHANGE OF VENUE. See that Title.

CHARGE TO JURY. See that Title.

## DEFAULTING WITNESS BEFORE GRAND JURY.

10. *Sufficiency of indictment in description of process.*—An indictment which charges that the defendant, "having been regularly subpoenaed or summoned to appear as a witness before the grand jury, to answer as to any gaming within his knowledge, did fail or refuse to attend and testify in obedience to such summons, without a good excuse" (Code of 1876, § 4136), is fatally defective on demurrer: it should contain a substantial description of the subpoena or summons and its service, as in the analogous case of resisting an officer in the execution of legal process.—*Drake v. The State*, 62.
11. *Excuse for default; by whom determinable, and charge as to.*—When a defaulting witness before the grand jury is proceeded against by indictment for a misdemeanor, the facts on which he relies as an excuse must be proved to the satisfaction of the jury, but the court must determine, as matter of law, whether they constitute a sufficient excuse; and a charge which refers the decision of this question to the jury, is erroneous.—*Ib.* 62.

## CRIMINAL LAW—Continued.

## EVIDENCE IN CRIMINAL CASES.

12. *Judicial notice of grand jury and indictments.*—The grand jury is a component part of the court by which it is organized, and its presentments, regularly returned and filed, become a part of the proceedings of the court itself; of which, consequently, the court will take judicial notice at the term at which they are so returned and filed.—*Overton v. The State*, 74.
13. *Voluntary offer to confess; admissibility of.*—The prisoner's voluntary offer to the jailer, who had him in charge, to tell all he knew about the homicide of which he was accused, if the jailer would promise that he should not be hurt for it; and his similar offer to a fellow-prisoner, if the latter would promise never to tell any one else; which proposals being rejected, no confessions were made by him,—are admissible evidence for the prosecution.—*Perkins v. The State*, 7.
14. *Declarations made by defendant immediately after commission of homicide.*—Declarations or statements, explanatory and exculpatory, made by the defendant immediately after the commission of the homicide, to the first persons who came up, and admitted on the trial, without objection, as a part of the *res gestæ*, are not governed by the rules which apply to confessions, and it is not necessary that the record should affirmatively show that, before they were admitted, they were proved to have been made freely and voluntarily.—*Allen v. The State*, 19.
15. *Impeaching witness by proof of weak mind or memory.*—When a witness in a criminal case, testifying as to facts which occurred immediately before and after a homicide committed two years previously, admits that he can not "step off one hundred yards and count it—that he would forget how far he had gone before he counted a hundred"—and his testimony otherwise shows weakness of mind, there is no error in refusing to allow him to be asked, on cross-examination, as to his superstitious notions concerning the effects of certain roots: such evidence is too remote from the issue, and does not tend to show that he was not a good observer of facts, and faithful in narrating them; nor is it erroneous to refuse to let him be asked, "for the purpose of testing his recollection," whether he did not swear, on the prisoner's application for bail several months before, "that he was weak-witted." (MANNING, J., dissenting as to the latter proposition.)—*Id.* 19.
16. *Same, by proof of contradictory statements.*—A witness may be impeached in a criminal case, by proof of contradictory statements made by him on an application by the prisoner for bail; although, when cross-examined as to such statements, he says "he does not remember whether he said so or not."—*Payne v. The State*, 80.
17. *Threats by deceased against prisoner; when not admissible.*—In a case of homicide, where no question of self-defense arises—as where the prisoner, having had a quarrel with the deceased, rode off several miles, and procured a gun, and followed the deceased from place to place, and attacked him when they met, and shot and killed him, the deceased having no weapon in his possession—threats made by the deceased against him two weeks previously, and communicated to him, are not competent evidence for the prisoner.—*Id.* 80.
18. *Evidence showing state of feeling between prisoner and deceased.*—The fact of anticipated litigation between the deceased and the prisoner, who were connected by marriage, or of family litigation in which the prisoner felt an interest, connected with his declaration that he would kill any one who sued him under like circumstances, is admissible evidence for the prosecution, as bearing on the question of the relations subsisting between him and the deceased, and the state of his feelings towards the deceased; but evidence touching the merits of such litigation is not admissible for him in rebuttal.—*Commander v. The State*, 1.
19. *Competency of prosecutor as witness.*—On a prosecution for trespass after warning (Code of 1876, §§ 4419-20), the prosecutor is a competent wit-



## CRIMINAL LAW—Continued.

- ness for the State, though entitled to the fine on conviction. (*Northcot v. The State*, 43 Ala. 330, asserting a different principle, declared overruled by statute.)—*Daniels v. The State*, 56.
20. *Same*.—On a prosecution for obtaining money or property by false pretenses, the person defrauded is a competent witness for the State.—*Sandy v. The State*, 58.

## FALSE PRETENSES.

21. *Sufficiency of indictment*.—An indictment for obtaining money under a false pretense, which pursues the form given in the Code (No. 48, p. 996), is sufficient.—*Sandy v. The State*, 58.
22. *Obtaining money by false pretense; what constitutes*.—To constitute the offense of obtaining money under a false pretense (Code of 1876, § 4370), it is not necessary that the money should be paid directly to the defendant: it is sufficient if it was paid to another at his request, and in payment of his debt.—*Ib.* 58.
23. *Competency of prosecutor as witness*.—On a prosecution for obtaining money or property by false pretenses, the person defrauded is a competent witness for the State.—*Ib.* 58.

## INDICTMENT.

24. *Caption*.—The caption of an indictment is that entry of record showing when and where the court was held, who presided as judge, the venire, and who were summoned and sworn as grand jurors: which caption is an essential part of every indictment, and must be affirmatively shown by the record, though the doctrine possibly had its origin in *certiorari* proceedings from courts of inferior and limited jurisdiction.—*Goodloe v. The State*, 93.
25. *Same*.—The caption of an indictment is that entry of record showing when and where the court was held, who presided as judge, the venire, and who were summoned and sworn as grand jurors; and this general caption, which is a part of every indictment, though not required to be included in the copy served on the prisoner in a capital case, may be referred to, to supply a defect in the name of the county, in the special caption or heading at the commencement of any particular indictment.—*Overton v. The State*, 73.
26. *Judicial notice of grand jury and indictments*.—The grand jury is a component part of the court by which it is organized, and its presentments, regularly returned and filed, become a part of the proceedings of the court itself; of which, consequently, the court will take judicial notice at the term at which they are so returned and filed.—*Ib.* 73.
27. *Statement of time in indictment*.—In an indictment for selling spirituous liquors to a person of known intemperate habits, "not having at the time the requisition of a physician that the same was for medical purposes," it is sufficient to allege that the offense was committed before the finding of the indictment, without a more definite statement of the time.—*Atkins v. The State*, 45.
28. *Same*.—In an indictment, found in April, 1876, for the larceny of part of a growing crop, it is not necessary to allege that the offense was committed after the passage of the act (February 20, 1875), creating and punishing such offenses.—*Harris v. The State*, 50.
29. *Statement of value and time in indictment for larceny*.—In an indictment for the larceny of a cow, found in April, 1877, it is not necessary to aver the value of the animal, nor that the offense was committed after the 20th February, 1875; since the statute approved on that day (Code of 1876, § 4358) makes the offense grand larceny without regard to value, and a prosecution for petit larceny, committed before that day, would be barred by the statute of limitations.—*Adams v. The State*, 52.
30. *Alternative averments in indictment*.—When an indictment, or a count in an indictment, charges several distinct offenses in the disjunctive, each

## CRIMINAL LAW—Continued.

- alternative averment must be sufficient to justify a conviction. *Pickett v. The State*, 77.
31. *Sufficiency of indictment, in description of house entered.*—An indictment for breaking and entering a store-house, "in which goods, merchandise, or other valuable thing, was kept for use," &c., is fatally defective on demurrer: it should describe the "other valuable thing," so that the court may determine whether it falls within the statute, and the prisoner be informed of the charge against him.—*Ib.* 77.
  32. *Same.*—In an indictment for burglary, a count which describes the building burned as "a barn or stable," or as "a barn, house, or building," is fatally defective on demurrer.—*Horton v. The State*, 72.
  33. *Keeping bawdy-house, and vagrancy; sufficiency of indictment.*—A count which charges that the defendant "did keep a certain house of ill fame, then and there resorted to for the purpose of public prostitution and lewdness," sufficiently charges the common-law offense of keeping a bawdy-house; and a count which charges that she "was a common prostitute, or the keeper of a house of prostitution, and had no honest employment, whereby to maintain herself," sufficiently charges the statutory offense of vagrancy (Code of 1876, § 4218); but a count which simply charges that she "was a common prostitute, or the keeper of a house of prostitution," without more, is not a sufficient charge of any offense.—*Toney v. The State*, 97.
  34. *Obtaining money by false pretenses; sufficiency of indictment.*—An indictment for obtaining money under a false pretense, which pursues the form given in the Code (No. 48, p. 996), is sufficient.—*Sandy v. The State*, 58.
  35. *Defaulting witness before grand jury; sufficiency of indictment in description of process.*—An indictment which charges that the defendant, "having been regularly subpoenaed or summoned to appear as a witness before the grand jury, to answer as to any gaming within his knowledge, did fail or refuse to attend and testify in obedience to such summons, without a good excuse" (Code of 1876, § 4136), is fatally defective on demurrer: it should contain a substantial description of the subpoena or summons and its service, as in the analogous case of resisting an officer in the execution of legal process.—*Drake v. The State*, 62.
  36. *Removing or selling mortgaged property; sufficiency of indictment.*—An indictment which charges that the defendant "did remove, conceal, or sell a horse, the personal property of A. H., for the purpose of hindering, delaying, or defrauding the said A. H., who had a claim to said horse under a written instrument, to-wit: a mortgage he, the said defendant, then and there having knowledge of the existence of said written instrument or mortgage" (Code of 1876, § 4353), is sufficiently definite and certain.—*Glenn v. The State*, 104.
  37. *Verdict of guilty, under indictment containing good and bad counts.*—Under an indictment containing several counts, one of which is good, no demurrer being interposed to the others, a general verdict of guilty will be referred to the good count, and the conviction will be sustained. *Glenn v. The State*, 104; *Toney v. The State*, 97.

JUROS AND JURY. See that Title.

## LARCENY.

38. *Larceny of cow; statement of value and time in indictment.*—In an indictment for the larceny of a cow, found in April, 1877, it is not necessary to aver the value of the animal, nor that the offense was committed after the 20th February, 1875; since the statute approved on that day (Code of 1876, § 4358) makes the offense grand larceny without regard to value, and a prosecution for petit larceny, committed before that day, would be barred by the statute of limitations.—*Adams v. The State*, 52.
39. *Larceny of growing crop; statement of time in indictment.*—In an indictment, found in April, 1876, for the larceny of part of a growing crop, it is not necessary to allege that the offense was committed after the

## CRIMINAL LAW—Continued.

passage of the act (February 20, 1875) creating and punishing such offense.—*Harris v. The State*, 50.

40. *Ownership of stolen property; variance between averment and proof.*—Under an indictment for the statutory offense of larceny of part of a growing crop (Code of 1876, § 4358), if the ownership of the crop is laid in one person, a conviction can not be had on proof that it belonged to him and another person jointly: the statute (*Ib.* § 4800) in reference to the averment and proof of ownership of "personal property," in criminal cases, does not apply to such an indictment, since a growing crop is not personal property.—*Ib.* 50.
41. *Averment and proof of ownership of stolen property.*—When husband and wife are living together, and the husband has possession of personal property belonging to the wife, it may be described as his in an indictment for larceny.—*Lavender v. The State*, 60.
42. *Description of animal stolen.*—A pig, four or five months old, may be described as a hog, in an indictment for larceny.—*Ib.* 60.

## MURDER; MANSLAUGHTER.

43. *Homicide perpetrated by firing pistol into dwelling-house, without specific intent to kill.*—Where the homicide was committed by firing a pistol, by night, through the window of a lighted room, in which four persons were sitting around the fire, the court may properly refuse to instruct the jury, on the request of the prisoner, that if he did not intend to kill or shoot at any of the inmates of the room, but merely intended to frighten them, he was not guilty of any higher offense than manslaughter in the second degree: such a charge, without qualification, or explanation, was calculated to mislead the jury, by withdrawing from their consideration the recklessness of the act, as showing a depraved mind regardless of human life (Code, § 4295), which might make the offense murder in the first degree.—*Washington v. The State*, 10.
44. *Murder; statutory degrees of.*—The statutory provisions of Alabama, as to the different degrees of murder (Code of 1876, § 4295), explained, illustrated, and distinguished from the statutory provisions of Pennsylvania and New York.—*Mitchell v. The State*, 26.
45. *Homicide perpetrated by act greatly dangerous to lives of others, and evidencing depraved mind regardless of human life.*—A homicide, "perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life," is, by the terms of the statute, murder in the first degree. This provision of the statute applies to homicides committed from "universal malice," as it is called in the books; as by purposely discharging a loaded gun into a crowd of people, or wrecking a passenger train on a railroad, whereby one or more persons are killed; but, *ex vi terminorum*, it excludes a homicide which is committed by a blow or injury intentionally aimed at and inflicted on the person killed, though such homicide may be murder in the first degree under another clause of the statute. Hence, where the homicide was committed by a blow with an oaken stick, intentionally aimed at the deceased, it is error to instruct the jury, "that if the homicide was perpetrated by an act greatly dangerous to the life of the deceased, and evidenced a depraved mind regardless of human life, it would be murder in the first degree."—*Ib.* 26.
46. *Self-defense, manslaughter, and murder in second degree.*—When a homicide is committed on sudden provocation, without formed design, it may be murder in the second degree, manslaughter in the first degree, or self-defense, according to the attendant circumstances: if the provocation was mere words, however abusive and insulting, it is murder in the second degree: if a blow or injury given or threatened, not calculated to produce death or great bodily harm, it is manslaughter in the first degree; and if a blow or injury given, or apparently about to be given,



## CRIMINAL LAW—Continued.

- calculated to produce death or great bodily harm, the slayer himself not having intentionally brought on the difficulty, and not being otherwise able to escape, it is self-defense.—*Ib.* 26.
47. *Presumption of malice from use of deadly weapon.*—When life is taken by the direct use of a deadly weapon, the law presumes that the killing was malicious, unless the evidence establishing the killing also shows circumstances of justification, mitigation, or excuse, which overturn that presumption.—*Commander v. The State*, 1.
  48. *Evidence showing state of feeling between prisoner and deceased.*—The fact of anticipated litigation between the deceased and the prisoner, who were connected by marriage, or of family litigation in which the prisoner felt an interest, connected with his declaration that he would kill any one who sued him under like circumstances, is admissible evidence for the prosecution, as bearing on the question of the relations subsisting between him and the deceased, and the state of his feelings towards the deceased; but evidence touching the merits of such litigation is not admissible for him in rebuttal.—*Ib.* 1.
  49. *Voluntary offer to confess; admissibility of.*—The prisoner's voluntary offer to the jailer, who had him in charge, to tell all he knew about the homicide of which he was accused, if the jailer would promise that he should not be hurt for it; and his similar offer to a fellow-prisoner, if the latter would promise never to tell any one else; which proposals being rejected, no confessions were made by him,—are admissible evidence for the prosecution.—*Perkins v. The State*, 7.
  50. *Declarations made by defendant immediately after commission of homicide.* Declarations or statements, explanatory and exculpatory, made by the defendant immediately after the commission of the homicide, to the first persons who came up, and admitted on the trial, without objection, as a part of the *res gestæ*, are not governed by the rules which apply to confessions, and it is not necessary that the record should affirmatively show that, before they were admitted, they were proved to have been made freely and voluntarily.—*Allen v. The State* v. 19.
  51. *Charges as to imminent danger, or apprehension thereof.*—*Held*, that the following charges were calculated to mislead the jury, and were properly refused: "That if the jury have a reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of great bodily harm at the time of the killing, they must give the prisoner the benefit of that doubt, and acquit him;" "That if the circumstances were such as to create a reasonable belief in the mind of the accused that his danger was imminent, then the law says he may strike in self-defense."—*Ib.* 19.
  52. *Threats by deceased against prisoner; when not admissible.*—In a case of homicide, where no question of self-defense arises—as where the prisoner, having had a quarrel with the deceased, rode off several miles, and procured a gun, and followed the deceased from place to place, and attacked him when they met, and shot and killed him, the deceased having no weapon in his possession—threats made by the deceased against him two weeks previously, and communicated to him, are not competent evidence for the prisoner.—*Payne v. The State*, 80.

## PLEAS AND DEFENSES.

53. *Misnomer.*—A misnomer, in a criminal case, can only be taken advantage of by plea in abatement: if the defendant stands mute when arraigned, and the plea of not guilty is thereupon entered for him by the court (Code of 1876, § 4870), he can not take advantage of a misnomer disclosed by the evidence.—*Daniels v. The State*, 56.
54. *Former acquittal, and not guilty; practice in pleading.*—When issue is joined on the pleas of former acquittal and not guilty, the former issue should be first tried and decided, and it is irregular to submit both issues to the jury at the same time; but, in a case of misdemeanor, if the two pleas are interposed together, and the defendant goes to trial

CRIMINAL LAW—Continued.

on both at the same time, without objection, this is a waiver of the irregularity; yet, if the jury find a verdict of guilty, and fail to pass on the special plea, the judgment of conviction will be reversed.—*Moody v. The State*, 78.

55. *Plea of guilty, after former conviction.*—A single criminal act can not be split up into two or more distinct indictable offenses, and prosecuted as such; yet, under an indictment charging an assault with intent to murder, a plea of former conviction of an assault and battery without a weapon having been found in favor of the defendant, if the judgment entry recites that a *nolle prosequi* was thereupon entered as to the felony charged in the indictment, and that the defendant, "being then put on trial, under said indictment, for an assault and battery with a weapon, by leave of the court withdraws his plea of not guilty, herein before interposed by him, and pleads guilty of an assault and battery with a weapon," he can not complain that a verdict and judgment were thereupon rendered, finding him guilty of an assault and battery.—*Drake v. The State*, 42.
56. *Unauthorized discharge of jury.*—The discharge of the jury in a criminal case, after they have rendered their verdict, though it be inadvertently received when the prisoner is not in court, and is therefore void in a case of felony, amounts to an acquittal.—*Cook v. The State*, 39.

REMOVING MORTGAGED PROPERTY.

57. *Sufficiency of indictment.*—An indictment which charges that the defendant "did remove, conceal, or sell a horse, the personal property of A. H., for the purpose of hindering, delaying, or defrauding the said A. H., who had a claim to said horse under a written instrument, to-wit: a mortgage, he, the said defendant, then and there having knowledge of the existence of said written instrument or mortgage" (Code of 1876, § 4353), is sufficiently definite and certain.—*Glenn v. The State*, 104.

RESISTING OFFICER.

58. *What constitutes offense.*—Resisting or striking a constable when commanding the peace, there being no writ or process in his hands, is not resisting an officer in the execution of legal process (Code of 1876, § 4137), though it may be an assault and battery.—*Jones v. The State*, 99.

RETAILING SPIRITUOUS LIQUORS.

59. *Statement of time in indictment.*—In an indictment for selling spirituous liquors to a person of known intemperate habits, "not having at the time the requisition of a physician that the same was for medical purposes," it is sufficient to allege that the offense was committed before the finding of the indictment, without a more definite statement of the time.—*Atkins v. The State*, 45.
60. *Burden of proof as to requisition of physician.*—Under an indictment for selling spirituous liquors to a person of known intemperate habits, without the requisition of a physician, the *onus* is on the defendant to show that he had such requisition, and not on the prosecution to prove the want of it.—*Ib.* 45.
61. *Proof of known intemperate habits.*—In order to show that the defendant had knowledge of the intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is permissible for the prosecution to prove that said person was accustomed to drink daily, frequently, and openly, to a state of intoxication, in the town in which the defendant lived, of liquor there obtained from the defendant and others.—*Ib.* 45.

TRESPASS AFTER WARNING.

62. *Meaning of "premises."*—The word "premises," as used in the statute

## CRIMINAL LAW—Continued.

punishing a trespass after warning (Code of 1876, § 4419), means any real estate for an entry on which a civil action might be maintained, and includes an inclosed pasture situated more than a mile from the dwelling-house.—*Sandy v. The State*, 18.

63. *Competency of prosecutor as witness*.—On a prosecution for trespass after warning (Code of 1876, §§ 4419-20), the prosecutor is a competent witness for the State, though entitled to the fine on conviction. (*Northcot v. The State*, 43 Ala. 330, asserting a different principle, declared overruled by statute.)—*Daniels v. The State*, 56.

## TRIAL, AND ITS INCIDENTS.

64. *Trial by jury; constitutionality of law authorizing waiver of*.—The constitution of Alabama, while declaring that "the right of trial by jury shall remain inviolate," and that the defendant, "in all prosecutions by indictment," shall be entitled to a "speedy public trial by an impartial jury," also declares that the legislature may provide for the prosecution of misdemeanors before justices of the peace, thereby dispensing with a trial by jury; hence, a statute which authorizes a waiver of a trial by jury in such cases, the prosecution being commenced by indictment, and transferred to an inferior court, is not unconstitutional.—*Connelly v. The State*, 89.
65. *Oath of petit jury*.—When the jury, in a criminal case, are sworn to "well and truly try, and true deliverance make, between the people of the State of Alabama and the prisoner at the bar," this is not substantially the oath which ought to be administered to them (Rev. Code, § 4092), and the judgment will be reversed on account of this error.—*Commander v. The State*, 1; *Perkins v. The State*, 7.
66. *Same*.—In a criminal case, where a special jury is impaneled, it is the better practice to swear each juror separately as he is selected; but where the record shows that each was sworn separately, and all were afterwards collectively sworn, the oaths administered being substantially the same as prescribed by the statute (Code of 1876, § 4765), this is not erroneous.—*Allen v. The State*, 19.
67. *Same*.—A recital in the judgment-entry that the jury "were sworn and charged well and truly the issue joined to try, wherein the State of Alabama is plaintiff, and R. W., the prisoner at the bar, is defendant on trial, and a true verdict to render according to the evidence," sufficiently shows a substantial compliance with the requisitions of the statute (Code of 1876, § 4765) as to the oath to be administered to the jurors.—*Washington v. The State*, 10.
68. *Same*.—A recital in the judgment-entry, in a criminal case, that the jury were sworn "well and truly to try the issue joined," &c., sufficiently shows that the oath prescribed by law (Code of 1876, § 4765) was administered to them. (Overruling *Murphy v. The State*, 54 Ala. 178, as "inadvertently made.")—*Atkins v. The State*, 45.
69. *Competency of witnesses as jurors*.—Persons who have been summoned and sworn as witnesses for the prosecution in a criminal case, are not competent to serve as talesmen, and may be challenged for cause; and the error of putting them on the jury, against the defendant's objection, is not cured by the failure to examine them as witnesses in the case.—*Ib.* 45.
70. *Competency of jurors; objection to venire*.—Persons who have been summoned as witnesses for the prosecution, and persons who served as jurors on a former trial of the case, are not competent jurors, and may be challenged for cause; but the *venire* will not be quashed because they are knowingly summoned as jurors by the sheriff, when the record does not show that, without them, there was not a sufficient number of good and lawful men from whom a jury might be selected.—*Commander v. The State*, 1.

## VAGRANCY.

71. *Sufficiency of indictment*.—A count which charges that the defendant "was a



CRIMINAL LAW—Continued.

common prostitute, or the keeper of a house of prostitution, and had no honest employment, whereby to maintain herself," sufficiently charges the statutory offense of vagrancy (Code of 1876, § 4218); but a count which simply charges that she "was a common prostitute, or the keeper of a house of prostitution," without more, is not a sufficient charge of any offense.—*Toney v. The State*, 97.

72. *Evidence*.—Under an indictment for vagrancy as a common prostitute, or keeper of a house of prostitution, having no honest employment whereby to maintain herself, evidence of the reputation of the house in which the defendant lived is not admissible for the prosecution; nor is the bad character of the defendant admissible, in the first instance, as a fact showing that she was a common prostitute; but it may be shown that she resided in a house kept for prostitution, and was there visited by lewd and disorderly persons, and that her associates were persons of ill repute; and these facts being proved, she may, in rebuttal, prove that her health and physical condition rendered prostitution improbable, if not impossible.—*Ib.* 97.

VERDICT, AND JUDGMENT.

73. *Personal presence of prisoner in court on return of verdict*.—In a case of felony, the prisoner has a right to be present in court when the jury return their verdict; which right is not waived by the failure of his counsel to object to the verdict being received in his absence, nor can it be waived by them. If the verdict is received in his absence, it is void; and the error can not be cured, after the jury have been discharged, by immediately reassembling the jurors, examining on oath those who had left the court-room, and again receiving the verdict in the presence of the prisoner.—*Cook v. The State*, 39.
74. *Verdict of guilty, under indictment containing good and bad counts*.—When an indictment contains several counts, one of which is good, and there is no demurrer to the bad counts, a general verdict of guilty will be referred to the good count, and the conviction will be sustained.—*Toney v. The State*, 97; *Glenn v. The State*, 104.
75. *Whether court or jury fix punishment for misdemeanor*.—On plea of guilty, in cases of misdemeanor, the punishment is fixed by the court (Code of 1876, §§ 4453, 4484), and not by the jury.—*Drake v. The State*, 42.

DAMAGES.

1. *Care and diligence required of railroad company*.—In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence—that degree of diligence which very careful and prudent men exercise in the conduct of their own affairs; and this requires that they shall employ very careful and prudent men, and that the persons employed by them shall exercise such care and diligence as very careful and prudent men exercise in the conduct of their own private interests and important enterprises.—*Turner's Executor v. L. & N. Railroad Co.* 621.
2. *Contributory negligence*.—The doctrine of contributory negligence, as a defense to an action for damages on account of injuries caused by a careless or tortious act, has been materially modified, in its application to actions against railroad companies: although the plaintiff may have been at fault in the first instance, in getting on the railroad track, and thus placing himself in a position of peril, yet, if he makes all proper efforts to escape when the danger becomes apparent, and the servants of the railroad company fail to use all the proper means in their power by which the danger might be avoided, the railroad company is responsible for the injury, and the original contributory negligence is no defense to the action.—*Ib.* 621.
3. *Same*.—To avoid the defense of contributory negligence, it is not necessary that the wrongful act of the defendant, or its agents and servants,

DAMAGES—*Continued.*

should be "wanton and intentional," as erroneously stated in the case of *Government Street Railroad Co. v. Hanlon*, 53 Ala. 70: if the injury done be wanton, reckless, or intentional, that defense is overcome.—*Ib.* 621.

4. *Same.*—When a person of adult years is seen on a railroad track, in advance of an approaching train, and shows by his actions that he is aware of its approach, and is using the proper efforts to get out of its way, the person in charge of the train is not required to stop it, nor, ordinarily, even to check its speed; but, if the person be on horseback, on a high embankment, or in a deep cut, from which he probably can not escape in time, or be suddenly thrown from his horse, and can not escape, it is the duty of the engineer promptly to use all means in his power to avoid injury, and the company is liable if he fails to do so.—*Ib.* 621.

## DEEDS.

1. *Conveyance of land adversely held.*—A conveyance of lands, which are at the time in the possession of a third person, holding adversely to the grantor, is void, and the grantee cannot recover on it in an action at law against such adverse holder.—*Chapman v. Holding*, 522.
2. *Same.*—A conveyance of lands, which are at the time in the adverse possession of a third person, under claim of ownership, though without color of title, is void as against the adverse holder, and the grantee can not recover against him in ejectment; and this principle applies to a voluntary conveyance by a purchaser at a sale under execution.—*Bernstein v. Humes*, 582.
3. *Execution of conveyance; signature by mark; attesting witness.*—At common law, the signature to an instrument by mark only was valid, without attestation by a subscribing witness; and this principle is not changed by statute (Code of 1876, §§ 1, 2145), except as to conveyances of real estate, and other instruments which are required to be in writing.—*Bickley v. Keenan & Co.*, 293.
4. *Registration of mortgage; effect as notice.*—A mortgage of personal property may be admitted to record, without acknowledgment, or proof of execution (Code of 1876, § 2153); and when so recorded, its effect as constructive notice is the same as if such acknowledgment or proof had been made.—*Ib.* 293.
5. *Same.*—The registration of a conveyance operates as constructive notice only when the statute authorizes its registration, and only to the extent of those provisions which are within the registration statutes. Hence, the registration of a mortgage, by which one partner conveys to his co-partner his entire interest in the partnership property as security for a debt, while it would operate as constructive notice, as against subsequent creditors and purchasers, of the lien created on the mortgagor's interest in the property, would not have that effect so far as it imposed any restraint or limitation on the authority of the mortgagor as a partner.—*Monroe v. Hamilton*, 226.
6. *Sufficiency of deed, in description of property conveyed.*—A mortgage, or instrument purporting to create a statutory lien for advances to make a crop, which describes the property as "my entire crop of cotton and corn of the present year," without any other descriptive words, is not void for uncertainty and indefiniteness, but may be rendered sufficiently certain and definite by extrinsic proof.—*Ellis v. Martin*, 394.
7. *Conveyance of wife's statutory separate estate.*—Under the statute authorizing the sale and conveyance of property, belonging to the statutory separate estate of the wife, by the joint deed of husband and wife "attested by two witnesses" (Code of 1876, § 2707), it is not necessary that the two witnesses should subscribe their names in the presence of each other, nor that they should both be present when the deed is signed by the grantors.—*Logwood v. Hussey*, 417.
8. *Burden of proof, as to consideration of deed.*—Where a creditor files a bill to set aside, as fraudulent, a deed executed by his debtor, which recites

DEEDS—*Continued.*

the payment of a valuable consideration, the burden of proof is on the grantee, if the creditor's debt ante-dates the execution of the deed, to prove the payment of the purchase-money; or, if the deed was accepted in payment of an existing debt, to prove the existence and validity of such debt.—*Hamilton's Adm'r v. Blackwell*, 545.

9. *Deed of gift to married woman, for benefit of family; what interest children and husband take.*—A deed which recites that, "by the bounty and sympathy of the people, exhibited towards Mary W. and her family, owing to losses by fire sustained by her husband, who thereby became insolvent to a large amount, the party of the first part hath received amounts subscribed by the said people, to be applied for the benefit of said family, to secure to them a support;" that these amounts "have been invested by him in the property hereinafter described, whereon is a confectioner's shop," and that the deed is "made in pursuance of the objects of said donation;" and which conveys by quit-claim, to the said Mary W., "party of the second part, her heirs and assigns forever," the property described, "with all the furniture and stock in trade pertaining to said store, or confectioner's shop, all the debts due to the same, and the balance due on said subscription lists;" with a stipulation that "nothing herein contained shall be construed against the rights of any person or persons against this property, for supplies furnished in trade, or labor done, or articles supplied for building or carrying on the trade, contracted for by her said husband as agent of the party of the second part,"—does not fasten any trust on the property, such as a court of equity can enforce in favor of the children as beneficiaries, but vests the absolute title in the wife, contemplating that she shall support the family by carrying on the business, and giving her large powers to charge and dispose of the property; nor does it exclude the husband's statutory rights, if he should survive his wife.—*Jones v. Wilson*, 332.

10. *Amendment of sheriff's deed, in description of land.*—When a sheriff, by mistake, in advertising lands for sale under an execution, or order of sale from the Circuit Court, misdescribes a portion of the tract, as by inserting the north-east instead of the south-east quarter of the section, and the mistake is carried into his deed to the purchaser; he may, by leave of the court, pending an action by the purchaser against the defendant in execution for the lands, correct the erroneous description in the deed; and when the amendment is thus made under the order of the court, and in its presence, it relates back to the date of the deed, and entitles the plaintiff to a recovery.—*Ridgway & Wife v. Glover*, 181.

## DEPOSITION.

1. *General and indefinite interrogatories.*—An interrogatory to a witness, asking if the allegations in four specified paragraphs of the bill are not true, is leading, and is also objectionable for generality; and in answer to a general concluding interrogatory, asking him to state any other matter or thing within his knowledge, that may be of benefit to either of the parties to the cause, or material to the matters in controversy, the witness can only state matters which are germane or supplementary to his former answers.—*Blunt v. Strong*, 572.

DEVISE. See LEGACY AND DEVISE.

## DOWER.

1. *Right of dower in lands sold for payment of debts.*—When lands are sold by an administrator, under a probate decree for the payment of debts; and the purchasers, by agreement with the widow, pay her a compensation in money for her claim to dower in the lands: they are not entitled to an abatement of the purchase-money, to the extent of the sum so paid, nor is their claim of the right to such abatement any obstacle to a resale of the lands at their risk.—*Weakley v. Garbo's Adm'r*, 399.



## DOWER—Continued.

2. *Allotment of dower by Probate Court.*—The Probate Court has no jurisdiction to allot dower to the widow in lands in which her husband, though in possession, had only an undivided half-interest at the time of his death.—*Benagh v. Turrentine*, 557.
3. *Widow's statutory quarantine.*—The widow's statutory quarantine, or right to retain possession of the dwelling-house in which her husband most usually resided, with the buildings appurtenant thereto, "and the plantation connected therewith," free from the payment of rent, until her dower is assigned her (Code of 1876, § 2238), does not extend to a plantation situated several miles distant from the residence in town, and occupied by a tenant under a contract of renting.—*Ogbourne v. Ogbourne's Adm'r*, 616.
4. *Widow's quarantine, and duty and liability as administratrix.*—When the widow becomes administratrix of the estate of her deceased husband, it is her duty as administratrix to institute proceedings, within a reasonable time, to have her dower allotted to her; and if she fails to do so, she can not claim the rents and profits of the plantation as her statutory quarantine (Code of 1876, §§ 2238-9), but is chargeable as for a *devastavit*.—*Benagh v. Turrentine*, 557.
5. *Same.*—What is a reasonable time, within which she should institute such proceedings, depends somewhat on the known condition of the estate: when the estate is known to be insolvent, or where the widow has dissented from the will, no delay should be allowed; in other cases, ordinarily, eighteen months should be allowed for the presentation of claims, and ascertaining the condition of the estate.—*Ib.* 557.
6. *Same; taxes.*—When the widow, or her estate, is charged on settlement of her accounts as administratrix, on account of her failure to have her dower assigned, as for a *devastavit*, she is only chargeable with two-thirds of the value of the rent of the plantation from the time when she should have had her dower assigned, since the other third would belong to her as dower; and she should be credited with two-thirds of the taxes paid on the land from and during the same time.—*Ib.* 557.

## EJECTMENT.

1. *What title will support action.*—Prior possession for several years, accompanied with the erection of valuable improvements, and other acts of ownership, raises a presumption of title, which, in the absence of proof of an outstanding title in a third person, will support an ejectment against a mere trespasser.—*Eakin v. Brewer*, 579.
2. *Same.*—When a mortgage reserves no right of possession in the mortgagor, or the law-day has passed, nothing but an equity of redemption remains in the mortgagor, and a purchaser under execution against him does not acquire such title as will sustain an ejectment; but, where the mortgage reserves to the mortgagor the possession and enjoyment of the property, with the right to use and rent it, until default shall be made in the payment of the secured bonds, extending through several years, this is a clear legal right, which is subject to levy and sale under execution against him; and a purchaser at the sale would acquire a title on which he might recover, in ejectment, against any one who does not show a paramount title.—*Bernstein v. Humes*, 582.
3. *Plea of not guilty, and disclaimer.*—The plea of not guilty is an admission of possession by the defendant (Code of 1876, §§ 2962-3), and is equivalent to the consent rule at common law; and when it is pleaded, the defendant can not also enter a disclaimer.—*Ib.* 582.
4. *Sufficiency of verdict for plaintiff.*—In ejectment, or a statutory action in the nature of ejectment, issue being joined on the plea of not guilty, without any disclaimer as to a part of the premises, a verdict finding the issues for the plaintiff is a verdict for the entire premises; and is sufficient: it is only when the verdict is for less than the entire premises sued for, that it is necessary to describe the part found for plaintiff.—*Chapman v. Holding*, 522.

EJECTMENT—*Continued.*

5. *Conclusiveness of judgment in ejectment, and when equity will enjoin action.* Authorities cited as to the conclusiveness of a judgment in ejectment, as between the same parties, on the same title, in subsequent actions; and as to the extreme cases in which a court of equity will, by injunction, stop further litigation; questions not necessary to be determined in this case. The statute (Code of 1876, § 2969) "at least shows that the right to bring ejectment between the same parties, on the same title, is not limited to one trial."—*Jones v. DeGraffenreid*, 145.
6. *When equity will enjoin ejectment.*—A court of equity will not, in the absence of some special equity, enjoin the prosecution of an action of ejectment; nor will it interfere, where the title asserted by each party is of legal cognizance; as where the plaintiff sues to recover land which he claims as his homestead, and the defendant insists that his right of homestead exemption has been waived and forfeited.—*Shaw & Cox v. Lindsey*, 345.

ERROR AND APPEAL.

1. *When appeal lies in criminal case.*—A criminal case can not be brought to this court by appeal, on bill of exceptions, while a motion for a new trial is pending, the judgment being suspended until the decision of the motion.—*Overton v. The State*, 73.
2. *When appeal lies from chancery decree.*—A decree in a chancery cause, in favor of a special administrator *ad litem*, against the administrator in chief, each in his representative capacity, is a decree in favor of the estate, against the estate: is a nullity, there being no adverse interests or parties, and no appeal lies from it.—*Ex parte Lyon*, 650.
3. *To what term appeal should be taken.*—An appeal from an interlocutory decree in chancery, overruling a demurrer to a bill, or a motion to dismiss for want of equity, etc. (Code of 1876, § 3918), should be taken to the first Tuesday in some month during the pending term of this court (§3925), if the legal notice can be given, and not to the next term; otherwise, the delay and cost of protracted litigation, which the statute was intended to prevent, will not be avoided, and the object of the statute will be frustrated.—*Winn v. Dillard*, 369.
4. *Waiver of appeal.*—When a defendant in a chancery cause, having prayed and obtained an appeal from an interlocutory decree overruling a demurrer to the bill, files an answer and cross-bill before the return of the appeal to this court, or takes any other steps in the cause inconsistent with the pendency of the appeal, he thereby waives the appeal, and it will be dismissed on motion.—*Id.*, 369.
5. *Cross assignments of error.*—In a case at law, there is no rule of practice, which allows the appellee to assign errors on the record, on account of adverse rulings of the court below shown by the appellant's bill of exceptions.—*Nelson v. Mettary*, 301.
6. *Error without injury in charge to jury.*—When the bill of exceptions shows that the plaintiff, on the trial below, proved a clear legal title in himself, entitling him to recover, the judgment in his favor will not be reversed because the court instructed the jury that an equitable title would support his action.—*Wood v. Montgomery*, 500.
7. *Error without injury; rule as to, in criminal cases.*—In a criminal prosecution for murder, the doctrine of error without injury, as in civil cases, will not be applied; hence, the judgment of conviction in this case was reversed, and the cause remanded, on account of an erroneous charge to the jury as to the constituents of murder in the first degree, although the conviction was for murder in the second degree, which opened an acquittal of the higher offense.—*Mitchell v. The State*, 26.
8. *Abstract charge.*—To authorize a reversal on account of an abstract charge, the record must show that it misled the jury, to the prejudice of the appellant.—*Hummett v. Brown*, 499.
9. *Charge requiring explanation.*—A charge given by the court, which asserts a correct proposition of law, but, under some tendencies of the evidence,

ERROR AND APPEAL—*Continued.*

- requires an additional explanatory charge, is not a reversible error: it is the duty of the party complaining of it to ask the proper explanatory charge.—*Chapman v. Holding*, 523.
10. *Same*.—A charge which is calculated to mislead the jury, but not otherwise objectionable, is not a reversible error: the party objecting to it should ask an explanatory charge.—*McCrory's Adm'r v. Rash*, 474.
  11. *Verdict against charge of court*.—That the jury, by their verdict, have disregarded the charge of the court, is not error, but is good matter for a motion for a new trial; and the ruling of the primary court on such motion is not revisable on error.—*Chapman v. Holding*, 523.
  12. *Presumption as to pleadings*.—When the record recites that the court sustained a demurrer to the whole complaint, for a misjoinder of counts, and that the defendant then demurred to the second count, and, his demurrer being overruled, he then filed pleas, on which issue was joined; this court will presume that, after sustaining the demurrer to the whole complaint, the court gave the plaintiff leave to amend, and that he amended his complaint by striking out the first count.—*Master-son v. Multheins*, 260.
  13. *Presumptions in favor of judgment; what will not be indulged*.—When a motion is entered on the docket to quash an execution, and to set aside a sale of lands under it, on certain specified grounds, and the motion is granted by the court; this court will not, in order to sustain the judgment, presume that the action of the court was justified by other facts not specified in the motion, although the bill of exceptions does not purport to set out all the evidence that was introduced.—*Sheffey v. Davis*, 548.
  14. *Rulings on demurrer; when revisable*.—Rulings on demurrer, not shown by the judgment, though copied in the transcript by the clerk, are not revisable on error.—*Chapman v. Holding*, 522.
  15. *When admission of irrelevant evidence is reversible error*.—The admission of irrelevant evidence, which has a tendency to mislead the jury, or to confuse and distract their minds, is an error which will work a reversal of the judgment.—*Vanderenter & Co. v. Ford & Moseley*, 610.
  16. *Defects in process*.—Defects in the form of process, which are amendable, can only be taken by plea in abatement, and are not available on error or appeal.—*Peebles v. Weir*, 413.
  17. *Probate decree on evidence; how considered on appeal*.—When the correctness of a probate decree depends on the evidence, all of which is set out in the bill of exceptions, this court will not disturb it, except under circumstances which would justify the setting aside of the verdict of a jury.—*Harwood's Adm'r v. Pearson*, 410.
  18. *Conclusiveness of decree in chancery, affirmed on appeal*.—A decree in a chancery cause, rendered on final hearing on pleadings and proof, as to the relative priority of two mortgages, having been affirmed by this court on appeal, the question of priority is definitely settled in the cause, and can not be re-opened, by petition filed in the court below by one of the parties, on grounds not presented on the former hearing.—*Marlove & Wife v. Benagh*, 323.
  19. *Conclusiveness of decree on appeal*.—When this court, on appeal in a chancery cause, partly affirms, and partly reverses the chancellor's decree, and remands the cause "for further proceedings not inconsistent with" the opinion filed, the chancellor is concluded by the decree of this court, and can not in any manner change that part of his former decree which was here affirmed.—*Lyon v. Abscue*, 468.

## ESTATES OF DECEDENTS.

1. *Husband's interest in wife's lands*.—On the death of the wife, intestate, having a statutory separate estate, the husband is entitled to the use of the realty during his life (Code of 1876, § 2714).—*Jones v. Wilson*, 332.
2. *Husband's distributive interest in wife's estate*.—On the death of the wife, intestate, leaving a statutory separate estate (Code of 1876, § 2714), the husband is entitled to one-half of the personalty.—*Brown v. Grimes*, 648.



ESTATES OF DECEDENTS—*Continued.*

3. *Sale of decedent's lands, under probate decree, for payment of debts; jurisdiction of court, and sufficiency of petition.*—A petition by an administrator, for the sale of devised lands for the payment of debts, must allege that the personal property is insufficient for that purpose, and that the will contains no power of sale; otherwise, it is not sufficient to give the court jurisdiction, and an order of sale founded on it is void; but, if the will is made an exhibit to the bill, and contains no power of sale, this remedies the want of such an averment in the petition, when the proceedings are collaterally attacked.—*Arnett v. Bailey*, 435.
4. *Same; amendment of petition; irregularities.*—When the sale is collaterally attacked, and the record shows that two petitions were filed, one will be considered as an amendment of the other, in order to sustain the jurisdiction of the court; and when the jurisdiction is shown to have attached, by the filing of a sufficient petition, the sale can not be collaterally impeached, because the names and residences of all the parties in interest are not stated in the petition; nor because less than forty days elapsed between the filing of the petition and the day set for the hearing; nor because the order setting a day for the hearing of the petition appears to have been made several days before the petition was filed: these are mere irregularities, and do not affect the validity of the sale, when collaterally attacked.—*Ib.* 435.
5. *Sale of decedent's lands under probate decree; conveyance to purchaser, without report of payment of purchase-money.*—When lands are sold by an executor, under a decree of the Probate Court, and the sale is reported and confirmed, and a conveyance is executed by the executor to the purchaser, reciting therein the payment of the purchase-money; the conveyance will not be held void, in an action brought by the purchaser against a stranger, because the payment of the purchase-money was not reported to the court, and an order obtained for the execution of the deed.—*Wood v. Montgomery*, 500.
6. *Same; vendor's lien, as against sub-purchaser.*—A sub-purchaser of lands sold by an administrator under a probate decree, who contracts with the original purchaser for a portion of the lands, is not a debtor of the administrator, nor of the estate: if the administrator or heirs attempt to subject the lands so bought by him to the payment of the original purchase-money, an equity at once arises in his favor to have the other lands first subjected; and if the heirs have released the original purchaser from all liability on account of his purchase, with a reservation of the right to assert against the sub-purchaser their title to the lands bought by him, they can not assert against him a vendor's lien for any portion of the original purchase-money.—*Dugger v. Tayloe*, 504.
7. *Same; decree ordering conveyance to purchaser.*—When lands are sold by an administrator, under a probate decree, for equitable division, the title of the heirs or devisees is not divested, until the purchase-money has been paid, and a conveyance has been executed to the purchaser under the decree of the court, which decree may be rendered on the application either of the administrator or of the purchaser (Code of 1876, § 2468); and when the application is made by the purchaser, although notice to the heirs is not necessary, notice to the administrator is indispensable: and a decree rendered, without notice to him, is absolutely void, at law as well as in equity. (Overruling *Dugger v. Tayloe*, 46 Ala. 320.)—*Ib.* 504.
8. *When heirs or distributees may maintain bill in equity, against debtors of estate.*—The general rule is, that neither creditors, distributees, nor legatees can maintain a bill in equity against debtors of the estate, to subject the debts to the satisfaction of their demands; and if there is an exception to this general rule, where a debtor has, by fraud or misrepresentation, induced the administrator to accept worthless notes and bonds in payment of a debt, and the administrator is insolvent, the complainants must show the existence of a debt which the administrator himself could recover.—*Ib.* 504.
9. *Probate decree ordering sale of lands for payment of debts.*—A probate de-

ESTATES OF DECEDENTS—*Continued.*

- eree, ordering lands to be sold for the payment of debts by an administrator, ought to specify whether the sale should be for cash, or on credit; but the failure to so specify makes it, in effect, an order to sell for cash, and does not affect its validity.—*Weakley v. Gurley's Adm'r*, 399.
10. *Settlement of decedent's estate; when removed into equity.*—The distributees of a decedent's estate may, at any time before proceedings for a settlement have been commenced in the Probate Court, remove the settlement into the Chancery Court, without the assignment of any special reason; but the administrator can not file a bill for that purpose, without showing the existence of some special reason for the interposition of a court of equity; and the involved and complicated condition of the affairs of the estate, when caused by his own neglect and breach of duty, is not a sufficient reason to support such a bill.—*Ib.* 399.
  11. *Exemptions for benefit of decedent's widow and children.*—The act approved February 8, 1872, entitled "An act to exempt from administration property of decedents, and vest titles in the widow or child or children" (Sess. Acts 1871-2, p. 91), does not create cumulative or additional exemptions to those allowed by the existing statutes (Rev. Code, §§ 2061-2), but was intended as a substitute for those sections, and necessarily repeals them.—*Ogbourne v. Ogbourne's Adm'r*, 616.
  12. *Exemption of personalty in favor of decedent's family.*—The exemption of personal property for the benefit of the family of a deceased debtor, under the provisions of the act of April 23, 1873 (Sess. Acts 1872-3, p. 64), can only be claimed where he left a widow or minor child or children.—*Childs v. Jones & Co.* 352.

## EVIDENCE.

## ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence, as to terms of contract.*—In an action to recover damages for the breach of a special contract, for the purchase of a fence ordered by plaintiffs for defendants, and which defendants refused to receive because it was not made altogether of iron, the fact that defendants, after their refusal to receive the fence ordered by plaintiffs, "actually purchased an iron fence, and the amount paid for it," are not relevant and admissible evidence for defendants.—*Vandeventer & Co. v. Ford & Moseley*, 610.
2. *Relevancy of evidence, on question of negligence.*—In an action against a railroad company, to recover damages for killing plaintiff's testator while riding on the track, on horseback, the defendant cannot be allowed to prove "that there was danger to employees on the train in running over stock;" nor that other persons had been notified not to travel on the railroad track.—*Tanner's Executor v. L. & N. Railroad Co.*, 621.
3. *Cross-examination of witness.*—The servants of the railroad company, who were employed on the train at the time plaintiff's intestate was killed, having been examined as witnesses for the company, they may be questioned, on cross-examination, as to their statements and declarations relative to the accident, made a day or two after it happened; such questions are certainly permissible, as laying a predicate for proof of contradictory statements, even if they exceed the large latitude which is allowed in the cross-examination of witnesses.—*Ib.* 621.
4. *Impeaching witness, by proof of contradictory statements.*—A witness may be impeached in a criminal case, by proof of contradictory statements made by him on an application by the prisoner for bail; although, when cross-examined as to such statements, he says "he does not remember whether he said so or not."—*Payne v. The State*, 80.
5. *Impeaching witness by proof of weak mind or memory.*—When a witness in a criminal case, testifying as to facts which occurred immediately before and after a homicide committed two years previously, admits that he can not "step off one hundred yards and count it—that he would

## INDEX.

### EVIDENCE—Continued.

forget how far he had gone before he counted a hundred"—and his testimony otherwise shows weakness of mind, there is no error in refusing to allow him to be asked, on cross-examination, as to his superstitious notions concerning the effects of certain roots: such evidence is too remote from the issue, and does not tend to show that he was not a good observer of facts, and faithful in narrating them; nor is it erroneous to refuse to let him be asked, "for the purpose of testing his recollection," whether he did not swear, on the prisoner's application for bail several months before, "that he was weak-witted." (MANNING, J., dissenting as to the latter proposition.)—*Allen v. The State*, 19.

6. *Evidence showing state of feeling between prisoner and deceased.*—The fact of anticipated litigation between the deceased and the prisoner, who were connected by marriage, or of family litigation in which the prisoner felt an interest, connected with his declaration that he would kill any one who sued him under like circumstances, is admissible evidence for the prosecution, as bearing on the question of the relations subsisting between him and the deceased, and the state of his feelings towards the deceased; but evidence touching the merits of such litigation is not admissible for him in rebuttal.—*Commander v. The State*, 1.
7. *Threats by deceased against prisoner; when not admissible.*—In a case of homicide, where no question of self-defense arises—as where the prisoner, having had a quarrel with the deceased, rode off several miles, and procured a gun, and followed the deceased from place to place, and attacked him when they met, and shot and killed him, the deceased having no weapon in his possession—threats made by the deceased against him two weeks previously, and communicated to him, are not competent evidence for the prisoner.—*Payne v. The State*, 80.
8. *Proof of known intemperate habits.*—In order to show that the defendant had knowledge of the intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is permissible for the prosecution to prove that said person was accustomed to drink daily, frequently, and openly, to a state of intoxication, in the town in which the defendant lived, of liquor there obtained from the defendant and others.—*Atkins v. The State* 45.

### ADMISSIONS ; CONFESSIONS ; DECLARATIONS.

9. *Admissibility of declarations as part of res gestæ.*—The declarations of the servants of the railroad company, while returning to town on the train with the dead body of the deceased, are not admissible evidence against the company, as a part of the *res gestæ* connected with the killing. *Tanner's Executor v. L. & N. Railroad Co.*, 621.
10. *Declarations of third person, not part of res gestæ, nor explanatory of possession.*—The declaration of the sub-tenant from whom the defendant obtained the cotton, made at the time of delivering it, to the effect that it was not raised on the land rented from plaintiff, is not competent evidence for the defendant.—*Lavender v. Hall*, 214.
11. *Judgment as proof of debt.*—A judgment against the grantor is not evidence, as against a prior grantee, of the time when the debt was contracted on which the judgment is founded.—*Marshall v. Croom*, 121.
12. *Testimony as to any transaction with or statement by deceased person.*—When the estate of any deceased person is interested in the result of a suit, a party to the suit is not allowed to testify as to any transaction with or statement by the deceased (Code of 1876, § 3058); but the statute does not forbid any other person, not a party, to testify as to any such transaction or statement.—*Smith's Adm'r v. Bryant's Adm'r*, 235.
13. *Same.*—Under the statute relating to the competency of parties as witnesses in civil cases (Code of 1876, § 3058), the exception which declares that, "in suits or proceedings by or against executors or administrators, neither party shall be entitled to testify against the other, as to any transaction with or statement by any deceased person whose estate is interested in the result of such suit," &c., applies to and excludes the



## EVIDENCE—Continued.

distributees of the estate, who, though not nominally parties, are beneficially interested in the result of the suit.—*McCrary's Adm'r v. Rash's Adm'r*, 374.

14. *Voluntary offer to confess; admissibility of.*—The prisoner's voluntary offer to the jailer, who had him in charge, to tell all he knew about the homicide of which he was accused, if the jailer would promise that he should not be hurt for it; and his similar offer to a fellow-prisoner, if the latter would promise never to tell any one else; which proposals being rejected, no confessions were made by him,—are admissible evidence for the prosecution.—*Perkins v. The State*, 7.
15. *Declarations made by defendant immediately after commission of homicide.*—Declarations or statements, explanatory and exculpatory, made by the defendant immediately after the commission of the homicide, to the first persons who came up, and admitted on the trial, without objection, as a part of the *res gestæ*, are not governed by the rules which apply to confessions, and it is not necessary that the record should affirmatively show that, before they were admitted, they were proved to have been made freely and voluntarily.—*Allen v. The State*, 19.

## BURDEN, WEIGHT, AND SUFFICIENCY OF PROOF.

16. *Burden of proof as to requisition of physician.*—Under an indictment for selling spirituous liquors to a person of known intemperate habits, without the requisition of a physician, the *onus* is on the defendant to show that he had such requisition, and not on the prosecution to prove the want of it.—*Alkins v. The State*, 45.
17. *Burden of proof, as to credits or payments.*—On the settlement of the accounts of a guardian, as of an executor or administrator (Code of 1876, §§ 2516, 2793), the *onus* is on him to prove the correctness of payments or expenditures for which he claims credit.—*Hutton v. Williams*, 133.
18. *Burden of proof, as to payment, or right of retainer by administrator.*—When an administrator claims a credit, on final settlement of his accounts, for a debt which he has paid, the burden of proving the existence of the debt and its payment is on him; and if he claims to retain for a debt due to himself, he must clearly prove the existence of the debt; but, if the distributees admit the validity of the debt, and contest the credit on the ground of payment, the burden of proving such payment is cast on them.—*Harwood's Adm'r v. Pearson*, 410.
19. *Burden of proof, as to consideration of deed.*—Where a creditor files a bill to set aside, as fraudulent, a deed executed by his debtor, which recites the payment of a valuable consideration, the burden of proof is on the grantee, if the creditor's debt ante-dates the execution of the deed, to prove the payment of the purchase-money; or, if the deed was accepted in payment of an existing debt, to prove the existence and validity of such debt.—*Hamilton's Adm'r v. Blackwell*, 545.
20. *Charge as to sufficiency of evidence.*—In a civil cause, a mere preponderance of evidence is not sufficient to authorize a verdict for the plaintiff, unless it is sufficient to satisfy the minds of the jury; but a charge asked, asserting "that a preponderance of evidence merely, inclining the minds of the jury to sustain the plaintiff's claim, can not be regarded as sufficient," is calculated to mislead the jury, and is properly refused.—*Acklen's Adm'r v. Hickman*, 568.
21. *Same.*—In civil cases, where the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof; and a mere preponderance of the evidence, when it produces a reasonable conviction in the minds of the jury, is sufficient to sustain a verdict; but it is error to instruct the jury, as matter of law, either that they must find according to the preponderance of the evidence, or that they can not so find.—*Vauclaventer & Co. v. Ford & Mosseley*, 610.

## JUDICIAL KNOWLEDGE.

22. *Charter of municipal corporation.*—The charter of a municipal corporation

## EVIDENCE—Continued.

- is a public statute, of which the courts will take judicial notice. *Albrittin v. Mayor & Aldermen of Huntsville*, 486.
23. *Counties*.—This court takes judicial notice of the names of all the counties in the State, and knows there is no county named *Wadison*.—*Overton v. The State*, 73.
24. *Foreign statutes*.—The courts of Alabama can not judicially know how far the common law of England, by which lands could not be subjected by legal process to the payment of debts, has been changed by statute in Mississippi.—*Lide v. Parker's Executor*, 165.
25. *Grand jury and indictments*.—The grand jury is a component part of the court by which it is organized, and its presentments, regularly returned and filed, become a part of the proceedings of the court itself; of which, consequently, the court will take judicial notice at the term at which they are so returned and filed.—*Overton v. The State*, 74.
26. *Late civil war, and public affairs*.—The courts take judicial notice of the anomalous condition of things during the late war, which greatly increased the duties and responsibilities of trustees.—*Lyon v. Fosque*, 468.
27. *Same*.—This court judicially knows that the late civil war prevailed from 1861 to 1865, and that the statutes of limitation were suspended from the 11th January, 1861, to the 21st September, 1865.—*Bernstein v. Hunes*, 582.

## OPINION, AND LEGAL CONCLUSION.

28. *What witness may state*.—In an action against a railroad company, to recover damages for killing plaintiff's testator, the engineer in charge of the train at the time the accident happened, can not be allowed to testify that he used "all the means he had to stop the train," but should state what means he did use.—*Tanner's Executor v. L. & N. Railroad Company*, 621.
29. *Same*.—So, he cannot be asked, "whether the ground and bearing of the road-bed were such as would have permitted the deceased to escape injury by the locomotive and cars, but for his own conduct," &c.—*Ib.* 621.

## PAROL AND WRITTEN.

30. *Parol evidence, in aid of record*.—When the record of the Probate Court, in the matter of the settlement of a guardian's accounts, fails to show the appointment and appearance of a guardian *ad litem* for the ward, the defect can not be supplied by parol proof.—*Hutton v. Williams*, 133.
31. *Parol agreement contradicting judgment*.—An administrator, having allowed creditors to obtain judgments at law against him, can not obtain equitable relief against such judgments, on an averment that they were rendered upon "an agreement and understanding that no effort was to be made to charge him personally, or to charge the sureties upon his bond, with the amount of such judgments."—*Weakley v. Gurley's Adm'r*, 399.

## EXECUTION.

1. *Lien of execution*.—An execution is a lien on the property of the defendant, from the time it is received by the sheriff, although he may not have indorsed his receipt on it, nor entered it on his docket; and the death of the defendant does not destroy such lien, so long as successive executions are issued without the lapse of an entire term.—*Childs v. Jones & Co.*, 352.
2. *Same; how affected by bankruptcy*.—The lien of an execution creditor, whose judgment was rendered before the defendant obtained a discharge in bankruptcy, though no execution was then in the hands of the sheriff, is not destroyed by the bankruptcy, and may be enforced by an alias.—*Sheffey v. Davis*, 548.
3. *Claim of exemption; when not good cause for setting aside execution levy and*

EXECUTION—*Continued.*

- sale.*—A levy and sale of lands under execution will not be set aside, at the instance of the defendant and his wife, under a claim of homestead exemption, when the value of the property at the time of the levy and sale is not shown, and it is not shown that the claim was interposed before the sale.—*Ib.* 548.
4. *Prior sale under execution.*—A prior sale of the lands under execution, at which the wife of the defendant became the purchaser, furnishes no ground for setting aside a subsequent levy and sale, on the motion of him and his wife.—*Ib.* 548.
  5. *Liability of lands for debts, at common law, and by foreign statute.*—By the old common law of England, lands could not be subjected by legal process to the payment of simple debts; and the courts of Alabama can not judicially know how far this principle has been changed by statute in Mississippi.—*Lide v. Parker's Executor*, 165.
  6. *Same, in Alabama.*—The subjection of lands by legal process to the payment of debts is not, in Alabama, the mere consequence of statutory remedies, which the legislature may wholly take away, or practically abrogate. The statute of 13th Edw. 1, ch. 18, which gave a judgment creditor a writ of *elegit* against his debtor's lands, was in force here, as a part of the common law, during the five years of organized government which preceded its re-enactment in substance by the act of 1807 (Clay's Digest, 199, § 1). The settled law and policy of the State has always been to subject lands, equally with personal property, to the payment of debts; and while the legislature may change, modify, or enlarge existing statutory remedies, it can not, without violating the Federal constitution, take away all remedy for the enforcement of existing contracts, nor substitute new remedies which impair the value and benefit of such contracts.—*Nelson v. McCrary*, 301.
  7. *Sale of lands under execution, subject to claim of homestead exemption.*—The statute regulating the assignment of a homestead, when claimed by a defendant in execution (Rev. Code, § 2881), applied only to the homesteads which were exempted by the laws of which it was a part, and was directory merely: a failure on the part of the sheriff to comply with its provisions was a mere irregularity, which might be a ground for an application to set aside the sale, but did not invalidate the title of the purchaser, who bought subject to the claim of a homestead exemption.—*Ib.* 301.
  8. *Sale of lands under execution against mortgagor; title of purchaser.*—When a mortgage reserves no right of possession in the mortgagor, or the law-day has passed, nothing but an equity of redemption remains in the mortgagor, and a purchaser under execution against him does not acquire such title as will sustain an ejectment; but, where the mortgage reserves to the mortgagor the possession and enjoyment of the property, with the right to use and rent it, until default shall be made in the payment of the secured bonds, extending through several years, this is a clear legal right, which is subject to levy and sale under execution against him; and a purchaser at the sale would acquire a title on which he might recover, in ejectment, against any one who does not show a paramount title.—*Bernstein v. Humes*, 582.
  9. *Levy and sale of equity of redemption under execution; foreclosure of mortgage by sale under power.*—By statute (Code of 1876, § 3209), an execution may be levied on an equity of redemption in mortgaged lands; but, if the mortgage is foreclosed by a sale under the power, after the levy, but before the sale under the execution, the equity of redemption is cut off, and the purchaser at the subsequent execution sale acquires nothing.—*Shaw & Cox v. Lindsey*, 344.
  10. *Levy and sale of "perfect equity" under execution.*—The only "perfect equity" which, under the said statute, can be levied on and sold under execution, is that of a purchaser who has paid the entire purchase-money: the statute does not apply to the interest of a defendant in execution, whose lands are sold under a power in a mortgage while the execution is in the hands of the sheriff, and bought in for him by a



## EXECUTION—Continued.

third person, to whom he does not refund the money until after the subsequent sale under the execution.—*Ib.* 344.

11. *Sale of lands under judgment or decree afterwards reversed.*—A sale of lands, under a judgment or decree which is afterwards reversed on error, is not thereby avoided, unless the judgment or decree is void, and an averment, in a bill asking relief against a purchase at such sale, that the decree was "reversed and annulled" by this court on appeal, is not equivalent to an averment that it was void.—*Lesslie v. Richardson*, 563.

## EXECUTORS AND ADMINISTRATORS.

1. *Appointment of special administrator ad litem.*—When it is necessary that the estate of a deceased person shall be represented in any proceeding pending in the Probate or Chancery Court, the court is authorized by statute (Code of 1876, § 2625) to appoint a special administrator *ad litem*, either when the estate has no personal representative, or when its acting representative has a personal interest adverse to the estate; but, when there is an acting administrator in chief, who is a party to the suit in his representative character, the court cannot appoint an administrator *ad litem*, and render a decree in his favor, against the administrator in chief in his representative character.—*Ex parte Lyon*, 650.
2. *Executor's power over choses in action; devastated, and who is chargeable with.*—An executor or administrator, notwithstanding his large discretionary power over the choses in action in his hands for administration, can not apply them in payment of his individual debts, without committing a *devastavit*, for which the person who receives them, having notice of his abuse of authority, is answerable; but this principle does not apply to a debt for which, although the executor was the principal debtor, the testator was also bound as his surety.—*Shelton v. Carpenter*, 201.
3. *Sale of lands by executor, under power, for payment of debts, and for distribution.*—A will contained these clauses: "In the first place, I desire and will that my executors, or administrators, shall pay off all my debts, of every kind and nature; and if necessary to effect this, I will them to sell as much of my property as may be sufficient to do the same. Then, I wish, and hereby authorize them, to sell at public auction, on a credit of one, two, and three years, all my property of every kind, real and personal; purchasers to give notes, with two or more approved securities, bearing interest from date;" and the proceeds of sale, when collected, after setting aside a specific sum to be invested for the benefit of the widow during her life, were to be distributed among his children: *Held*, that the power to sell for the payment of debts was distinct from the power to sell for distribution, &c., and was not subject to the same directions as to terms; and that, the terms of sale, when made for the payment of debts, being discretionary with the executor, it was not essential to its validity that security should be required from a solvent purchaser.—*Ib.* 201.
4. *Transfer of note by executor; payment to him in Confederate treasury-notes.*—An executor, or administrator, has power to transfer a promissory note, assets of the estate, in payment of a debt due from the decedent; and it was also within his power, having sold property of the estate during the late war, to receive payment of the purchaser's note, before its maturity, in treasury-notes of the Confederate States.—*Ib.* 201.
5. *Assignment of note by administrator.*—A promissory note, payable to an administrator, assets of his intestate's estate, may be transferred or assigned by him without an order of court; and in the absence of fraud, or collusion between the administrator and the assignee, the transfer cannot be impeached by the beneficiaries of the estate, when the assignee attempts to foreclose a mortgage given to secure the note.—*Nelson v. Stollenwerk*, 140.
6. *Executor's assent to legacy.*—When an executor assents to a legacy of an estate for life, and delivers the property to the person to whom it is

EXECUTORS AND ADMINISTRATORS—*Continued.*

thus bequeathed, this operates as an assent to the legacy of the remainder, and divests him of all title as executor; and if the property is delivered back to him on the death of the tenant for life, he holds it as bailee of the remaindermen, and not as executor.—*Harlins v. Hughes*, 316.

7. *Right of retainer by executor.*—The executor has a right to retain, out of the assets which come to his hands, the amount of a debt due to him from the testator, or a debt due to him which is, by the terms of the will, charged on the property; and if, without retaining, he parts with the possession of the property, he cannot charge it with his debt in the hands of the person to whom he delivered it, without showing some excuse for his negligence and laches.—*Ib.* 316.
8. *Retainer by tenant's administrator, for rent due him as landlord.*—If the tenant dies after his crop is gathered, and letters of administration on his estate are granted to his landlord, the latter may retain, out of the proceeds of the sale of the crop, the amount due for the rent of the current year, and is not required to go into equity for relief; but he cannot retain for the rent of a former year, and, if the estate is insolvent, can only share *pro rata* with other creditors.—*Smith's Adm'r v. Bryan's Adm'r*, 235.
9. *Bill of conformity by administrator; when does not lie.*—An administrator can not maintain a bill of conformity against the creditors of the estate, who have obtained judgments at law against him, on the ground that the estate has become insolvent by reason of the depreciation in the value of the property generally, when it appears that, if he had exercised due diligence in the administration, the debts might have been paid before any depreciation occurred.—*Weakley v. Gurley's Adm'r*, 399.
10. *Settlement of administrator's accounts, at suit of administrator de bonis non.* An administrator *de bonis non*, having cited his predecessor to a settlement in the Probate Court, can not afterwards have the settlement transferred to the Chancery Court, under a bill filed by him for a settlement of his own administration.—*Ib.* 399.
11. *Burden of proof, as to payment, or right of retainer by administrator.*—When an administrator claims a credit, on final settlement of his accounts, for a debt which he has paid, the burden of proving the existence of the debt and its payment is on him; and if he claims to retain for a debt due to himself, he must clearly prove the existence of the debt; but, if the distributees admit the validity of the debt, and contest the credit on the ground of payment, the burden of proving such payment is cast on them.—*Harwood's Adm'r v. Pearson*, 410; also, *Hutton v. Williams*, 133.
12. *Widow's quarantine, and duty and liability as administratrix.*—When the widow becomes administratrix of the estate of her deceased husband, it is her duty as administratrix to institute proceedings, within a reasonable time, to have her dower allotted to her; and if she fails to do so, she can not claim the rents and profits of the plantation as her statutory quarantine (Code of 1876, §§ 2238-9), but is chargeable as for a *devastavit*.—*Benagh v. Turrentine*, 557.
13. *Same.*—What is a reasonable time, within which she should institute such proceedings, depends somewhat on the known condition of the estate: when the estate is known to be insolvent, or where the widow has dissented from the will, no delay should be allowed; in other cases, ordinarily, eighteen months should be allowed for the presentation of claims, and ascertaining the condition of the estate.—*Ib.* 557.
14. *Same; taxes.*—When the widow, or her estate, is charged on settlement of her accounts as administratrix, on account of her failure to have her dower assigned, as for a *devastavit*, she is only chargeable with two-thirds of the value of the rent of the plantation from the time when she should have had her dower assigned, since the other third would belong to her as dower; and she should be credited with two-thirds of the taxes paid on the land from and during the same time.—*Ib.* 557.
15. *Repairs to dwelling-house and lands.*—On settlement of the accounts of the widow, as administratrix of the estate of her deceased husband, she is

EXECUTORS AND ADMINISTRATORS—*Continued.*

- entitled to a credit for the value of repairs on the dwelling-house and plantation, which were necessary to their habitation and cultivation; but, being held entitled to the use and occupation of the premises for two years free of rent, as her statutory quarantine, she should be charged with her reasonable proportion of the cost of such repairs; and these questions should be settled on the settlement of her administration by the Probate Court.—*Ib.* 557.
16. *Board and maintenance of infant distributees.*—When such settlement is had with the administrator *de bonis non* of the husband's estate, the widow can not be allowed a credit for the board and maintenance of the infant distributees; though that question might be settled on the final distribution of the estate, after the claims of creditors had been satisfied.—*Ib.* 557.
  17. *Computation of interest.*—On the settlement of an administrator's accounts, he should be allowed interest on disbursements, unless he then had in his hands money belonging to the estate; but, if he then had money in his hands, on which he was chargeable with interest, the disbursements should be first applied to the extinguishment of the accrued interest, and the balance deducted from the money on hand.—*Ib.* 557.
  18. *Probate decree on settlement of administrator's accounts; conclusiveness of.*—A decree rendered by the Probate Court, on the final settlement of an administrator's accounts, is as valid and conclusive as a decree in chancery on a bill for an account, except so far as the statute authorizes a court of equity to intervene for the correction of errors of law or of fact.—*Hutton v. Williams*, 107.
  19. *Same; validity of, as affected by omission to file list of heirs, and want of parties.*—The failure or omission of the administrator to file a list of the heirs and distributees of the estate, as required by the statute (Code of 1876, § 2509), does not render the decree on the settlement of his accounts invalid, nor even erroneous; and if the decree ascertains the amount of his indebtedness, and the credits to which he is entitled, showing a balance in his favor, it is valid and binding until reversed, although no execution could issue on it.—*Ib.* 107.
  20. *Liability of guardian and administrator, when offices are united in same person.*—When an administrator becomes guardian of one of the infant distributees of his intestate's estate, he does not hold the ward's distributive interest as guardian, until it has been separated and distinguished from the other assets in his hands as administrator; but, when a guardian, whose authority has terminated by the majority of the ward, afterwards becomes administrator of the ward's estate, not having settled his accounts as guardian, his liability as guardian ceases by operation of law, and he becomes liable as administrator; and a subsequent settlement of his guardianship, made by him in the Probate Court, though void as a judicial proceeding, is an election by him to hold and account for the estate as administrator.—*Ib.* 107.

## EXEMPTIONS.

1. *Homestead exemptions; governed by what law.*—The right to a homestead exemption, as against the claims of creditors, is to be determined by the law which was of force when the debt was contracted, and not by a subsequent law which was of force when the property was acquired: such subsequent statute, when enlarging homestead exemptions, can not operate on existing contracts without impairing their obligation.—*Nelson v. McVary*, 302.
2. *Same.*—As to debts contracted after its adoption, the constitution of 1868 superseded all former exemption laws, and governed all homestead rights until the passage of the act approved April 23, 1873, which enlarged the homestead from eighty to one hundred and sixty acres; but, as against debts contracted in 1872, this statute can not apply, so as to give the enlarged homestead in lands acquired after its passage.—*Ib.* 302.
3. *Same; extent and value in 1858.*—Under the statutory provisions as to



EXEMPTIONS—*Continued.*

homestead exemptions which were of force in 1858, and which determine the right of exemption as against debts then contracted, the exempt homestead could not exceed eighty acres in quantity, nor \$500 in value; and these statutes were repealed by the act approved April 23, 1873, and so continued until re-enacted, as to such debts, by the act approved February 9, 1877; the effect being that, during the interval of nearly four years, there was no exemption as against debts contracted prior to the constitution of 1868.—*Horn v. Wiatt*, 297.

4. *Same*; governed by what law.—The right to claim a homestead exemption, as against a mortgage dated March 31, 1873, is to be determined by the constitution of 1868 alone.—*Johnson v. Murphy, Agnew & Co.* 288.
5. *Same*; claim to proceeds of sale of, as between two mortgagees.—Under a bill in equity to settle the relative priority of two mortgages, and to have them foreclosed by a sale of the mortgaged property, which was the town residence of the mortgagor, and brought \$7,000 at the register's sale; the second mortgagee can not claim \$2,000 of the proceeds, on the ground that his mortgage, which was signed by the mortgagor and his wife jointly, was a valid alienation of the homestead, and the first was not.—*Marlowe & Wife v. Benagh*, 323.
6. *Same*; allotment by commissioners, and re-allotment.—When the defendant claims a homestead in lands on which an execution has been levied by the sheriff, who thereupon appoints commissioners to set apart and appraise the homestead (Rev. Code, §§ 2880-81), and neither party objects to the allotment made by them; the defendant's title to the homestead so allotted becomes perfect, and it is not necessary that there should be a re-allotment as against *alias* executions.—*Jones v. DeGraffenreid*, 145.
7. *Same*; when equity will remove cloud from title.—A court of equity will entertain a bill to remove a cloud from the title to a homestead exemption, as against a purchaser at execution sale, when the owner of the homestead is in possession, and can not test his title by an action at law; but this principle has no application, where the purchaser at execution sale has already brought an action at law, and has recovered a judgment in ejectment for the lands claimed.—*Ib.* 145.
8. *Same*; nature of estate, and in what court asserted.—When a homestead exemption has been legally claimed and allotted, the title to it is legal, and may be asserted or defended successfully in a court of law; consequently, the owner can not come into equity to assert or protect it, without showing special circumstances for the interposition of equity.—*Ib.* 145; also, *Shaw & Cox v. Lindsey*, 344.
9. *Sale of lands under execution, subject to claim of homestead exemption.*—The statute regulating the assignment of a homestead, when claimed by a defendant in execution (Rev. Code, § 2881), applied only to the homesteads which were exempted by the laws of which it was a part, and was directory merely: a failure on the part of the sheriff to comply with its provisions was a mere irregularity, which might be a ground for an application to set aside the sale, but did not invalidate the title of the purchaser, who bought subject to the claim of a homestead exemption.—*Nelson v. McClurry*, 301.
10. *Claim of exemption; when not good cause for setting aside execution levy and sale.*—A levy and sale of lands under execution will not be set aside, at the instance of the defendant and his wife, under a claim of homestead exemption, when the value of the property at the time of the levy and sale is not shown, and it is not shown that the claim was interposed before the sale.—*Sheffey v. Davis*, 548.
11. *Exemption of personal property; waiver of.*—The right to claim an exemption of personal property, secured to debtors by constitutional and statutory provisions, is a personal privilege, which the debtor may waive; and it is waived, under the laws existing on the 8th April, 1874, by a stipulation in a promissory note in these words: "In consideration of supplies furnished, for which this note is given, I hereby waive all right to exemptions under the laws of Alabama."—*Brown v. Leitch*, 313.

EXEMPTIONS—*Continued.*

12. *Form of judgment, on note waiving exemption.*—Reversing the judgment of the court below, and holding that the waiver of exemptions contained in the note sued on, which was dated April 8, 1874, was valid, the court ordered the following words to be added to the judgment in favor of plaintiff: "And against this judgment, and the execution to be issued thereon, there is no exemption of personal property of the defendant."—*Id.* 313.
13. *Exemption of personalty in favor of decedent's family.*—The exemption of personal property for the benefit of the family of a deceased debtor, under the provisions of the act of April 23, 1873 (Sess. Acts 1872-3, p. 64), can only be claimed where he left a widow or minor child or children.—*Childs v. Jones & Co.* 352.
14. *Exemptions for benefit of decedent's widow and children.*—The act approved February 8, 1872, entitled "An act to exempt from administration property of decedents, and vest titles in the widow or child or children" (Sess. Acts 1871-2, p. 91), does not create cumulative or additional exemptions to those allowed by the existing statutes (Rev. Code, §§ 2061-2), but was intended as a substitute for those sections, and necessarily repeals them.—*Oybourne v. Oybourne's Adm'r.* 616.

FALSE PRETENSES. See CRIMINAL LAW, 21, 22, 23.

FORMER ACQUITTAL. See CRIMINAL LAW, 54.

FORMER CONVICTION. See CRIMINAL LAW, 55.

## FRAUDS, STATUTE OF.

1. *Executed and executory contracts.*—The statute of frauds requiring certain contracts to be reduced to writing (Code of 1876, § 2121), applies only to executory contracts; and if the parties to a verbal contract have voluntarily executed it, a stranger can not be heard to question its validity under the statute.—*Lavender v. Hall*, 214.
2. *Promise to answer for debt of another.*—Where the adult distributees of an estate, on a settlement had with the administrator, charge him with the amount of advances procured by him from a commission-merchant on the credit of the estate, and themselves assume the debt to the merchant; giving their note for the amount, obtaining an extension of the time of payment, and renewing the note on a further extension,—the note is not, within the statute of frauds (Code of 1876, § 2121), a promise to answer for the debt of another.—*Locke v. Humphreys*, 117.

## FRAUDULENT CONVEYANCES.

1. *Voluntary and fraudulent conveyances.*—The settled law in this State is, that a voluntary conveyance, or a conveyance on consideration not deemed valuable in law, is inoperative against existing creditors, and voidable at their instance, without regard to the intent with which it was made, or the present ability of the grantor to pay his debts; but subsequent creditors can not avoid it, without proof of actual or intentional fraud, nor can they be allowed to participate in the proceeds, when it is set aside at the instance of existing creditors, without proof of actual or intentional fraud.—*Kirksey v. Sneedcor*, 192.
2. *Fraudulent conveyance.*—A deed by which a father conveyed all his property to his son, on a recited consideration of \$8,000, held fraudulent and void as against creditors, on the facts proved in this case, notwithstanding the denials of the answers: the question of fraud *vel non* having been submitted by the chancellor to a jury, whose verdict against the validity of the deed he approved, and his decree being here affirmed.—*Horn v. Wiatt*, 297.
3. *Validity of conveyance by insolvent debtor, to near relative.*—A conveyance

FRAUDULENT CONVEYANCES—*Continued.*

by an insolvent debtor, against whom suits are pending, to a son, or other near relative, in form a deed of bargain and sale, and reciting the payment of a valuable consideration, will be closely scrutinized at the instance of his creditors, but it is not necessarily fraudulent; and though executed with a fraudulent intent on the part of the grantor, it will not be set aside as fraudulent and void, unless the grantee had knowledge of such fraudulent intent, and participated in it.—*Marshall v. Croom*, 121.

4. *Same.*—In this case, an insolvent debtor, while suits were pending against him, conveyed all his property to his son and daughter, by three separate deeds, all executed within a period of a few months, and reciting the payment of a valuable consideration; and it not being shown that any of the purchase-money was applied in payment of his debts, it was held, that the conveyances were executed by him with intent to hinder, delay, and defraud his creditors; but, as against the daughter, who denied all charges of fraud, and all knowledge of her father's indebtedness, no proof of such indebtedness being adduced, the conveyance to her was held valid: while the conveyance to the son, who also denied all the charges of fraud, but admitted the indebtedness and his own knowledge thereof, and failed to explain satisfactorily how he acquired the purchase-money alleged to have been paid, and other suspicious facts connected with the payment, was set aside as fraudulent.—*Ib.* 121.
5. *Same; rents and profits, as against fraudulent grantee.*—When a fraudulent grantee holds the property conveyed to him under a secret trust for the benefit of the grantor, he is responsible to creditors for rents and profits during his possession; but this principle does not apply, where the fraudulent conveyance, which is set aside at the suit of judgment creditors, was intended to vest the beneficial use of the property in the grantee.—*Ib.* 121.
6. *Burden of proof, as to consideration of deed.*—Where a creditor files a bill to set aside, as fraudulent, a deed executed by his debtor, which recites the payment of a valuable consideration, the burden of proof is on the grantee, if the creditor's debt ante-dates the execution of the deed, to prove the payment of the purchase-money; or, if the deed was accepted in payment of an existing debt, to prove the existence and validity of such debt.—*Hamilton's Adm'r v. Blackwell*, 545.

## GARNISHMENT.

1. *Against mortgagee.*—A second mortgagee can not, by a garnishment against the first mortgagee, as the debtor of the mortgagor, reach and subject rents and profits received by the garnishee in excess of his debt.—*Toomer, Sykes & Billups v. Randolph*, 356.
2. *At suit of tax collector.*—A summary proceeding by garnishment at the suit of a tax collector, under the revenue law of 1868 (§ 53), could only be instituted before a justice of the peace; and there is no authority for extending the provisions of the law to the Circuit Court, in cases which exceed the jurisdiction of a justice. (Changed by statute, Code of 1876, § 416).—*The State v. McAllister*, 105.

## GUARDIAN AND WARD.

1. *Settlement of guardian's accounts in Probate Court; effect of.*—A settlement by a guardian with the Probate Court, after the ward has attained his majority, without the appearance of the ward in person, by attorney, or by guardian *ad litem*, whether it be void, voidable, or only irregular, is an admission of record by him of his indebtedness to the ward, for the sum shown to be in his hands; and so, an account of the hiring of his ward's slaves, filed in said court, is a similar admission, rendering him liable to account for the hires.—*Hutton v. Williams*, 107.
2. *Liability of guardian and administrator, when offices are united in same per-*



GUARDIAN AND WARD—*Continued.*

*son.*—When an administrator becomes guardian of one of the infant distributees of his intestate's estate, he does not hold the ward's distributive interest as guardian, until it has been separated and distinguished from the other assets in his hands as administrator; but, when a guardian, whose authority has terminated by the majority of the ward, afterwards becomes administrator of the ward's estate, not having settled his accounts as guardian, his liability as guardian ceases by operation of law, and he becomes liable as administrator; and a subsequent settlement of his guardianship, made by him in the Probate Court, though void as a judicial proceeding, is an election by him to hold and account for the estate as administrator.—*Ib.* 107.

3. *Probate decree on settlement of guardian's accounts; when binding on ward.*—On the settlement of a guardian's accounts in the Probate Court, made during the minority of the ward, and before the guardian's office has expired, the ward must be represented by a guardian *ad litem*, appointed by the court; otherwise the settlement is voidable, at the election of the infant, seasonably expressed, though the guardian himself can not avoid it, even on error; and neither the appearance of the infant himself in person, nor the appearance of an adult brother on his behalf, and their acquiescence in the account as stated, render the decree valid and binding on him.—*Hutton v. Williams*, 133.
4. *Burden of proof, as to credits or payments.*—On the settlement of the accounts of a guardian, as of an executor or administrator (Code of 1876, §§ 2516, 2793), the *onus* is on him to prove the correctness of payments or expenditures for which he claims credit.—*Ib.* 133.
5. *Rules of practice, on statement of guardian's accounts by register.*—On the settlement of a guardian's accounts in equity, the register should be directed to observe the mode of proceeding on similar settlements in the Probate Court, so far as practicable and consistent with the rules of chancery practice.—*Ib.* 133.
6. *Allowance to guardian for board, clothing, &c.; investment in Confederate bonds.*—Where the guardian, instead of lending out or investing the funds of his ward, which were in his hands at the commencement of the war, and hiring out the negroes, retained and used the money for his own benefit, and became himself the hirer of the slaves, he can not be allowed, in extinguishment of the debt thus incurred, to claim credits for board, clothing, and tuition of his ward, at Confederate prices; nor had he any authority to fund such debt in Confederate bonds for his ward.—*Ib.* 133.
7. *Medical services to hired slaves.*—In the absence of an agreement to the contrary, the hirer of slaves was bound to furnish medical attendance for them at his own expense; and hence, where a guardian hired his ward's slaves, not being able to contract with himself for exemption from this liability, he can not be allowed a credit for medical services rendered to them by himself as physician.—*Ib.* 133.

HABEAS CORPUS. See BAIL.

HOMESTEAD. See EXEMPTIONS.

HOMICIDE. See CRIMINAL LAW, 43-52.

## HUSBAND AND WIFE.

1. *Wife's statutory separate estate; statutory provisions apply to what.*—By the uniform decisions of this court, the various statutory provisions securing and regulating the separate estates of married women have been held applicable only to property which, in the absence of those statutes, would not be the separate property of the wife.—*Castleman v. Jeffries*, 380.
2. *Conversion of wife's lands into money, by sale.*—Where husband and wife are domiciled in Alabama, and lands belonging to the wife in Texas

HUSBAND AND WIFE—*Continued.*

- are voluntarily sold by them, the proceeds of sale being remitted to them here, the money is to be regarded as the acquisition of new property, and becomes a part of the wife's statutory separate estate.—*Ib.* 380.
3. *Husband's power to use and invest wife's money.*—As to money belonging to the *corpus* of the wife's statutory separate estate, the husband, as her trustee, has large discretionary powers of investment, and may lawfully use it in purchasing "articles of comfort and support of the household," such as her separate estate is by statute rendered liable for, or in payment of such articles already purchased.—*Ib.* 380.
  4. *Creditor's right of retainer, as against wife, on account of family supplies furnished.*—A person who has received or collected money belonging to the *corpus* of the wife's statutory separate estate, under such circumstances as render him only liable to her for so much money had and received, may lawfully retain the amount due to him for necessary family supplies furnished by him to her and her husband, for which the statute renders her estate liable.—*Ib.* 380.
  5. *Payment; what constitutes.*—In an action by the wife, suing alone, for money had and received, belonging to the *corpus* of her statutory separate estate, the defendant may show, under the plea of payment, that the money was collected by him on a check, or draft, which the husband had delivered to him on account of an indebtedness for "articles of comfort and support of the household" already supplied and furnished by him, and which was received and used by him as so much money: if the check was delivered and received as a payment, or if it was delivered pursuant to an agreement, made when the debt was contracted, that payment should be so made, it would constitute a payment.—*Ib.* 380.
  6. *Conveyance of wife's statutory separate estate.*—Under the statute authorizing the sale and conveyance of property, belonging to the statutory separate estate of the wife, by the joint deed of husband and wife "attested by two witnesses" (Code of 1876, § 2707), it is not necessary that the two witnesses should subscribe their names in the presence of each other, nor that they should both be present when the deed is signed by the grantors.—*Logwood v. Hussey*, 417.
  7. *Transfer of note given for rent of wife's lands.*—A promissory note, given for the rent of the wife's lands, and payable to the husband, belongs to him, and may be transferred by him without the signature or concurrence of his wife.—*Westmoreland & Trousdale v. Foster*, 449.
  8. *Note payable to husband, "trustee," &c.*—When a note is taken by the husband payable to himself, with the words added, "trustee for Mrs. S. J. F.," his wife, the superadded words are mere *descriptio personæ*, and are not sufficient to show that the note belongs to his wife.—*Ib.* 449.
  9. *Competency of husband, as witness for wife.*—The husband is a competent witness for the wife, where his testimony does not relate to any communication made between them, nor tend to violate the sacred confidence of the marital relation.—*Chapman v. Holding*, 528.
  10. *Husband's interest in wife's lands.*—On the death of the wife, intestate, having a statutory separate estate, the husband is entitled to the use of the realty during his life (Code of 1876, § 2714).—*Jones v. Wilson*, 332.
  11. *Husband's distributive interest in wife's estate.*—On the death of the wife, intestate, leaving a statutory separate estate (Code of 1876, § 2714), the husband is entitled to one-half of the personality.—*Brown v. Grimes*, 648.

INDICTMENT. See CRIMINAL LAW, 24-37.

## INFANTS.

1. *Infancy as ground of defense or relief against decree.*—Infancy is a personal privilege, available only to the infant himself, or his personal representative: a decree may be voidable by him, while valid and binding on all

other parties; in which case, they can not invoke his infancy to protect them against the operation and effect of the decree, nor join with him in a bill for relief against it.—*Hutton v. Williams*, 107.

2. *Bastardy; infancy of female complainant*.—Although the proceeding is instituted by the affidavit of the mother, and costs may be adjudged against her, if a verdict is found for the defendant; yet, the prosecution being conducted in the name of the State as plaintiff, the infancy of the mother is immaterial, and does not render necessary the interposition of a next friend for her.—*Hanna v. The State*, 100.
3. *Appointment of overseer of public road; infancy as disqualification*.—The appointment of a person, who is at the time under twenty-one years of age, as an overseer of a public road (Code of 1876, § 1632), is not void: his minority is a personal exemption, which he may either claim or waive.—*Allison v. The State*, 54.

See, also, GUARDIAN AND WARD.

### INSOLVENT ESTATES.

1. *Filing claim against*.—When a claim against an insolvent estate is filed in the Probate Court, properly verified, after the report, but before the declaration of insolvency, this is a sufficient filing.—*Shelton's Adm'r v. Poulson's Adm'r*, 578.
2. *Contribution between creditors*.—A creditor of an insolvent estate, whose claim has accrued since the distribution of the assets, or whose disabilities have been since removed, may recover his *pro-rata* share of the assets from another creditor, who has received, through the decree of the court, a greater dividend than he would have been entitled to receive if the plaintiff's claim had been included with the other debts (Code of 1876, § 2585); but the statute does not apply to a creditor who has been paid in full by the personal representative before the estate was reported or declared insolvent.—*Shelton v. Carpenter*, 202.

INTEREST. See EXECUTORS AND ADMINISTRATORS, 17.

### JUDGMENTS AND DECREES.

1. *Judgment by default; what will sustain*.—The execution of a replevy bond by the defendant, in an attachment case, is sufficient to sustain a judgment by default, although the levy of the attachment is void, and there was no personal service of process.—*Peables v. Weir*, 413.
2. *Form of judgment, on note waiving exemption*.—Reversing the judgment of the court below, and holding that the waiver of exemptions contained in the note sued on, which was dated April 8, 1874, was valid, the court ordered the following words to be added to the judgment in favor of plaintiff: "And against this judgment, and the execution to be issued thereon, there is no exemption of personal property of the defendant."—*Brown v. Leitch*, 313.
3. *Judgments rendered by incompetent judge; validity of*.—Judgments rendered by a judge *de facto*, whose election or appointment was afterwards declared unconstitutional and void, are nevertheless valid and binding, and are not reversible on account of his incompetency.—*Masterson v. Matthews*, 260.
4. *Action on judgment; sufficiency of complaint*.—In an action on a domestic judgment, it is sufficient to aver the rendition of the judgment, the court by which it was rendered, the date, names of parties, and amount; and it is not necessary to aver that the court had jurisdiction, nor that the judgment remains of full force, unreversed, and unsatisfied.—*Ib* 260.
5. *Judgment as proof of debt*.—A judgment against the grantor is not evidence, as against a prior grantee, of the time when the debt was contracted on which the judgment is founded.—*Marshall v. Croom*, 121.
6. *Judgment on demurrer to plea in abatement*.—On overruling a demurrer to a plea in abatement, the plaintiff may, under our practice, plead over, if he elects to do so; but the record must affirmatively show that he



JUDGMENTS AND DECREES—*Continued.*

- claimed the privilege, or he cannot complain that he was deprived of it. *Day v. Huckabee*, 425.
7. *Conclusiveness of judgment in ejectment, and when equity will enjoin action.* Authorities cited as to the conclusiveness of a judgment in ejectment, as between the same parties, on the same title, in subsequent actions; and as to the extreme cases in which a court of equity will, by injunction, stop further litigation; questions not necessary to be determined in this case. The statute (Code of 1876, § 2969) "at least shows that the right to bring ejectment between the same parties, on the same title, is not limited to one trial."—*Jones v. DeGraffenreid*, 145; *Shaw & Cox v. Lindsey*, 345.
  8. *Motion in arrest of judgment, or for judgment non obstante veredicto; when not grantable.*—When there is a general verdict for the plaintiff, and no repugnance between it and the plaintiff's pleadings, the defendant can not move in arrest of judgment, nor have judgment entered *non obstante veredicto*, on the ground that some of the plaintiff's documentary evidence shows that the verdict finds inconsistent facts: this would be, at most, only matter to be considered on motion for a new trial.—*Chapman v. Holding*, 522.
  9. *Probate decree ordering conveyance to purchaser.*—When lands are sold by an administrator, under a probate decree, for equitable division, the title of the heirs or devisees is not divested, until the purchase-money has been paid, and a conveyance has been executed to the purchaser under the decree of the court, which decree may be rendered on the application either of the administrator or of the purchaser (Code of 1876, § 2468); and when the application is made by the purchaser, although notice to the heirs is not necessary, notice to the administrator is indispensable: and a decree rendered, without notice to him, is absolutely void, at law as well as in equity. (Overruling *Dugger v. Tayloe*, 46 Ala. 320.)—*Dugger v. Tayloe*, 504.
  10. *Sale of lands under judgment or decree afterwards reversed.*—A sale of lands, under a judgment or decree which is afterwards reversed on error, is not thereby avoided, unless the judgment or decree is void; and an averment, in a bill asking relief against a purchase at such sale, that the decree was "reversed and annulled" by this court on appeal, is not equivalent to an averment that it was void.—*Leslie v. Richardson*, 563.
  11. *Probate decree on settlement of administrator's accounts; conclusiveness of.* A decree rendered by the Probate Court, on the final settlement of an administrator's accounts, is as valid and conclusive as a decree in chancery on a bill for an account, except so far as the statute authorizes a court of equity to intervene for the correction of errors of law or of fact. *Hutton v. Williams*, 107.
  12. *Same; validity of, as affected by omission to file list of heirs, and want of parties.*—The failure or omission of the administrator to file a list of the heirs and distributees of the estate, as required by the statute (Code of 1876, § 2509), does not render the decree on the settlement of his accounts invalid, nor even erroneous; and if the decree ascertains the amount of his indebtedness, and the credits to which he is entitled, showing a balance in his favor, it is valid and binding until reversed, although no execution could issue on it.—*Ib.* 107.

## JURORS AND JURY.

1. *Oath of petit jury.*—When the jury, in a criminal case, are sworn to "well and truly try, and true deliverance make, between the people of the State of Alabama and the prisoner at the bar," this is not substantially the oath which ought to be administered to them (Rev. Code, § 4092), and the judgment will be reversed on account of this error.—*Commander v. The State*, 1; *Perkins v. The State*, 7.
2. *Same.*—A recital in the judgment-entry that the jury "were sworn and charged well and truly the issue joined to try, wherein the State of Alabama is plaintiff, and R. W., the prisoner at the bar, is defendant on

JURORS AND JURY—*Continued.*

- trial, and a true verdict to render according to the evidence," sufficiently shows a substantial compliance with the requisitions of the statute (Code of 1876, § 4765) as to the oath to be administered to the jurors.—*Washington v. The State*, 10.
3. *Same*.—In a criminal case, where a special jury is impaneled, it is the better practice to swear each juror separately as he is selected; but where the record shows that each was sworn separately, and all were afterwards collectively sworn, the oaths administered being substantially the same as prescribed by the statute (Code of 1876, § 4765), this is not erroneous.—*Allen v. The State*, 19.
  4. *Same*.—A recital in the judgment-entry, in a criminal case, that the jury were sworn "well and truly to try the issue joined," &c., sufficiently shows that the oath prescribed by law (Code of 1876, § 4765) was administered to them. (Overruling *Murphy v. The State*, 54 Ala. 178, as "inadvertently made.")—*Atkins v. The State*, 45.
  5. *Competency of jurors; objection to venire*.—Persons who have been summoned as witnesses for the prosecution, and persons who served as jurors on a former trial of the case, are not competent jurors, and may be challenged for cause; but the venire will not be quashed because they are knowingly summoned as jurors by the sheriff, when the record does not show that, without them, there was not a sufficient number of good and lawful men from whom a jury might be selected.—*Commander v. The State*, 1.
  6. *Competency of witnesses as jurors*.—Persons who have been summoned and sworn as witnesses for the prosecution in a criminal case, are not competent to serve as talesmen, and may be challenged for cause; and the error of putting them on the jury, against the defendant's objection, is not cured by the failure to examine them as witnesses in the case.—*Atkins v. The State*, 45.
  7. *Unauthorized discharge of jury*.—The discharge of the jury in a criminal case, after they have rendered their verdict, though it be inadvertently received when the prisoner is not in court, and is therefore void in a case of felony, amounts to an acquittal.—*Cook v. The State*, 39.
  8. *Trial by jury; constitutionality of law authorizing waiver of*.—The constitution of Alabama, while declaring that "the right of trial by jury shall remain inviolate," and that the defendant, "in all prosecutions by indictment," shall be entitled to a "speedy public trial by an impartial jury," also declares that the legislature may provide for the prosecution of misdemeanors before justices of the peace, thereby dispensing with a trial by jury; hence, a statute which authorizes a waiver of a trial by jury in such cases, the prosecution being commenced by indictment, and transferred to an inferior court, is not unconstitutional.—*Connelly v. The State*, 89.

See, also, CHARGE OF COURT TO JURY.

## JUSTICE OF THE PEACE.

1. *When certiorari lies on justice's judgment*.—When a cause is removed from a justice's court by *certiorari*, it should not be dismissed, because the right of appeal was not lost when the *certiorari* was sued out: the policy of the statutes is to secure a trial on the merits, whether the cause is brought up by appeal or *certiorari*.—*Washington v. Parker*, 447.

## LANDLORD AND TENANT.

1. *When landlord may sue out attachment against tenant's crop*.—The statute gives a landlord the right to sue out an attachment against the crop of his tenant, in two cases: 1st, "when the tenant is about to remove the crop from the premises without paying the rent;" 2d, "when he has removed it, or any portion thereof, without the consent of the landlord" (R. C. §§ 2961-63). When the crop has been removed by the tenant, without the consent of the landlord, and without paying the rent, the

LANDLORD AND TENANT—*Continued.*

- intent of the tenant in removing it, and the distance from the demised premises to which it is removed, are immaterial inquiries, even though it be carried to other adjacent lands belonging to the landlord.—*Masterson v. Bentley*, 520.
2. *Landlord's statutory lien for rent.*—A landlord's lien on the crop of his tenant, for the rent of the leased premises, is created by the statute (Code of 1876, § 3467), and not by the issue or levy of an attachment, which is only given as a remedy for enforcing that lien.—*Ellis v. Martin*, 394.
  3. *Attachment for rent.*—An attachment for rent, at the suit of the landlord, should be issued against the tenant's crop only, and not against his estate generally; but, if issued against his estate generally, though it would be abated on plea, it is only irregular, and not absolutely void, and may properly be levied on his crop.—*Ib.* 394.
  4. *Landlord's statutory lien on crop, for rent.*—A landlord's lien on the crop of his tenant, for the rent of the leased premises, is created by the statute (Code of 1876, § 3467), and not by the levy of an attachment, which is only given as a remedy for enforcing it; but it extends only to the crop of the current year.—*Smith's Adm'r v. Bryant's Adm'r*, 235.
  5. *Retainer by tenant's administrator, for rent due him as landlord.*—If the tenant dies after his crop is gathered, and letters of administration on his estate are granted to his landlord, the latter may retain, out of the proceeds of the sale of the crop, the amount due for the rent of the current year, and is not required to go into equity for relief; but he cannot retain for the rent of a former year, and, if the estate is insolvent, can only share *pro rata* with other creditors.—*Ib.* 235.
  6. *Action on the case; when landlord may maintain, against person removing crop.*—A landlord may maintain a special action on the case, against a stranger who, having notice of his statutory lien for rent (Code of 1876, § 3467), carries away the crop from the leased premises, and appropriates it to his own use, whereby the landlord loses his rent; and it is no defense to such action, vindictive damages not being claimed, that the defendant did not intend to injure the landlord.—*Lavender v. Hall*, 214.
  7. *Landlord's lien for rent, on tenant's crop; assignment of note.*—The landlord's statutory lien on his tenant's crop, for the rent of the current year (Code of 1876, §§ 3467 *et seq.*), exists independent of the remedy by attachment given to enforce it, and passes by assignment of the note.—*Westmoreland & Trousdale v. Foster*, 448.
  8. *Same; assignee's remedies.*—The assignee of a note, given for the rent of land, may maintain an action for money had and received, against a purchaser of the tenant's crop, who, having bought with knowledge of his lien, has sold the crop, and received the proceeds of sale; and he may also maintain a bill in equity against such purchaser, notwithstanding his remedy at law.—*Ib.* 449.
  9. *Same; rights of reversioner and assignee.*—If, before the maturity of the note given for the rent, the reversion of the freehold has passed to another, the rent also passes to him, as an incident of the reversion, notwithstanding the assignment of the note.—*Ib.* 449.
  10. *Constructive notice of landlord's lien, by recitals of replevin bond.*—When an attachment is sued out to enforce an asserted landlord's lien, and is levied on the tenant's crop, which is thereupon replevied; and the replevin bond recites the issue of the attachment, and its levy on the crops grown on the lands, which are described; these recitals are sufficient to charge a surety on the bond with constructive notice of the claim asserted by the plaintiff in the suit.—*Ib.* 449.
  11. *Landlord's lien, and attachment against tenant's crop; distinguished from distress for rent at common law.*—The landlord's statutory lien on his tenant's crop, with the remedy by attachment given for its enforcement (Rev. Code, §§ 2961-63), unlike the right to distrain for rent at common law, does not cease at the expiration of the term, and is not impaired by the removal of the crop from the rented premises, but con-



LANDLORD AND TENANT—*Continued.*

- tinues until the crop passes into the possession of a purchaser without notice.—*Lomax v. Lettrand & Co.* 537.
12. *Same*; when purchaser is chargeable *vis à vis* notice.—Actual knowledge is not necessary to charge a purchaser from the tenant with notice of the landlord's lien on the crop: whatever is sufficient to put him on inquiry, is also sufficient to charge him with notice.—*Ib.* 537.
  13. *Same*.—The tenant having executed a mortgage on the "entire crop of cotton and corn which may be made during the present year, on the plantation in said county known as Mrs. C. L.'s plantation, which I" [the mortgagor] "am cultivating the present year;" this recital is notice to the mortgagee of the relation existing between the tenant and Mrs. C. L.; and notice of the relation is also notice of the landlord's statutory lien.—*Ib.* 537.
  14. *Same*.—The lien is the creature of the statute, and incident to the relation, and is not matter of contract, although it may be waived or relinquished by contract; but, to charge a purchaser with notice of it, it is not necessary that he should know the terms of the contract between the landlord and tenant, or the stipulated amount of rent.—*Ib.* 537.
  15. *Same*.—The fact that the crops are on the rented premises, is notice to all the world of the lien attached to them: it is only after their removal from the premises, when the tenant has possession of them distinct from his possession of the premises, that he can sell and convey a good title to the purchaser; and where, having executed a mortgage on them before they were grown, whose recitals are sufficient to charge the mortgagee with notice, he removes them from the premises, and delivers them to the mortgagee, the latter can not claim protection as a purchaser without notice.—*Ib.* 537.
  16. *Declarations of third person, not part of res gestæ, nor explanatory of possession*.—The declaration of the sub-tenant from whom the defendant obtained the cotton, made at the time of delivering it, to the effect that it was not raised on the land rented from plaintiff, is not competent evidence for the defendant.—*Lavender v. Hull*, 214.

## LARCENY. See CRIMINAL LAW, 38-42.

## LEGACY AND DEVISE.

1. *Pecuniary legacy; what is*.—A bequest of "one-third of the valuation of the lands hereinafter devised to my brother Henry," to whom the lands were devised "subject to the incumbrance that he shall pay one-third of the valuation of said lands to the said" legatee, is a pecuniary legacy, though charged on the lands.—*Brown v. Grimes*, 647.
2. *Who may sue for legacy, on death of legatee*.—The right to sue for and recover a pecuniary legacy, on the death of the legatee, intestate, not having received it, devolves on his personal representative; and it can not be recovered in equity by his children, as heirs and distributees, although the bill alleges that he owed no debts at the time of his death.—*Ib.* 647.
3. *Executor's assent to legacy*.—When an executor assents to a legacy of an estate for life, and delivers the property to the person to whom it is thus bequeathed, this operates as an assent to the legacy of the remainder, and divests him of all title as executor; and if the property is delivered back to him on the death of the tenant for life, he holds it as bailee of the remaindermen, and not as executor.—*Harkins v. Hughes*, 316.
4. *Construction of will charging widow's debts on property*.—Where a testator bequeathed certain property, real and personal, to his wife for life, and on her death, "after defraying her funeral expenses and paying her just debts," to be equally divided among his three children, to whom the residue of his property was also bequeathed, charged with the payment of his own debts; *held*, that the debts of the widow were charged only on the property in which she had an estate for life, and not on the testator's estate generally, and that the executor could not be charged with them in his representative character.—*Ib.* 316.

LEGACY AND DEVISE—*Continued.*

5. *Devise to "family of deceased son" during widowhood of his widow, with limitation over to his sons.*—Under a bequest and devise of lands and slaves "to the family of my deceased son Felix," consisting of his widow Sarah, two sons, and a daughter, with a direction that the property "shall be kept together and managed by the executors, during the widowhood of the said Sarah, for the benefit of herself and children; but, in the event of her marriage, she is to receive a child's part of the negroes," with some other personal property, "which property shall be hers for and during her natural life," but with a restriction against the removal of the slaves from the State; followed by these words: "The land devised for the benefit of the family of my deceased son Felix, I give to my grandsons, Benjamin and Francis," the sons of Felix, "to be equally divided between them when the younger shall arrive at the age of twenty-one years; the said land, however, to be used for the benefit of the widow and all her children, subject to the conditions before mentioned. My grand-daughter Alice," the daughter of Felix, "shall be entitled to receive an equal portion of the negro property, when she arrives at the age of twenty-one years, or marries; the whole property to be held and kept together, for the joint benefit of the family, unless the widow should marry, and then for the benefit of the three children,"—*held*, that the fee to the lands vested in the two grandsons, Benjamin and Francis; and that Alice took no interest therein, except in the use and enjoyment as a member of the family, during the widowhood of her mother, and subsequently during her own continued minority.—*Banks v. Jones*, 605.

## LIMITATIONS, STATUTE OF.

1. *Partial payment, as preventing bar of statute of limitations.*—A partial payment on a debt, before the statute of limitations has effected a bar, is a recognition of the debt, and fixes a new date from which the statute begins to run; but an indorsement of such partial payment, in the handwriting of the creditor, is not evidence of such payment.—*Acklen's Adm'r v. Hickman*, 568.
2. *Limitation of action for unlawful detainer.*—Three years is the statutory limitation for the unlawful detainer of lands (Code of 1876, § 3705); yet, when the action is brought by a judgment creditor, or other person having a statutory right to redeem, whose offer to redeem has been refused, quiet possession for three years after the sale is not necessarily a bar, since the statute does not begin to run until the accrual of the plaintiff's cause of action by the tender and refusal.—*Posey v. Pressley*, 243.
3. *Suspension during the war, and judicial knowledge thereof; computation of time.*—The late civil war prevailed, as this court judicially knows, from 1861 to 1865; and the statutes of limitations were suspended from the 11th January, 1861, to the 21st September, 1865: consequently, the statute of limitations of ten years can not bar an action commenced in July, 1871, unless the adverse holding commenced fourteen years, eight months, and ten days before the writ was sued out.—*Bernstein v. Humes*, 582.
4. *Vendor's lien; how affected by statute of limitations.*—A vendor's equitable lien for the unpaid purchase-money of land is not lost or destroyed because the statute of limitations has barred an action at law on the notes for the purchase-money; and this principle applies where he has conveyed the land by absolute deed, taking no mortgage or other security, as well as where he has retained the title, and executed only a bond for title. (MANNING, J., *dissenting*).—*Bizzell v. Nix*, 281.

## MORTGAGE.

1. *Theory of mortgage, at law and in equity, as to rents and profits received by mortgagee.*—At law, in the absence of a reservation or stipulation to the contrary, the mortgagee has an immediate right of entry and posses-

MORTGAGE—*Continued.*

- sion, and, after default, the estate vests in him absolutely, leaving in the mortgagor nothing but the equity of redemption, of which courts of law do not take cognizance; but, in equity, the mortgagee is regarded as a trustee of the rents and profits for the mortgagor, and is bound to apply them to the extinguishment of the debt, after paying taxes, necessary repairs, &c.—*Toomer, Sykes & Billups v. Randolph*, 356.
2. *Garnishment against mortgagee.*—A second mortgagee can not, by a garnishment against the first mortgagee, as the debtor of the mortgagor, reach and subject rents and profits received by the garnishee in excess of his debt.—*Id.* 356.
  3. *Sufficiency of mortgage in description of property conveyed.*—A mortgage, or instrument purporting to create a statutory lien for advances to make a crop, which describes the property as "my entire crop of cotton and corn of the present year," without any other descriptive words, is not void for uncertainty and indefiniteness, but may be rendered sufficiently certain and definite by extrinsic proof.—*Ellis v. Martin*, 394.
  4. *Contract held conditional sale, and not mortgage.*—An instrument of writing, in form a deed of bargain and sale, conveying personal property by absolute words of conveyance, but reserving to the grantor "the right to redeem the property" by a specified day, and containing a stipulation on his part, in the event of his failure to redeem, that he would pay a certain sum for the use of the property in the meantime,—is a conditional sale, and not a mortgage; when it is shown, also, that the recited consideration was paid, at the request of the grantor, in satisfaction of a debt which he owed to a third person, who held a mortgage on the property to secure it, and that there was no great disproportion between the value of the property and the sum so paid.—*Loggwood v. Hussey*, 417.
  5. *Mortgage of personally.*—A valid mortgage of personal property may be made by words only, without writing; and if it is reduced to writing, though signed by mark only, attesting witnesses are not necessary to its validity.—*Bickley v. Keenan & Co.* 293.
  6. *Registration of mortgage; effect as notice.*—A mortgage of personal property may be admitted to record, without acknowledgment, or proof of execution (Code of 1876, § 2153); and when so recorded, its effect as constructive notice is the same as if such acknowledgment or proof had been made.—*Id.* 293.
  7. *Mortgage between partners, of interest in partnership property.*—Where two persons are cultivating a crop as equal partners, and one executes to the other a mortgage on his entire interest, as security for an individual debt which the mortgagee has become liable to pay; and the mortgage contains a stipulation, that, since the crop will be gathered before the maturity of the debt, the mortgagee shall take possession of it, and dispose of it for the mutual benefit of the parties; and that the net profits, after settlement of the partnership dealings, shall be divided into two equal parts, one of which shall belong to the mortgagee absolutely, and the other shall be held by him in trust for the mortgagor, to be applied to the payment of the secured debt, and the balance paid over to the mortgagor; such mortgage does not operate a dissolution of the partnership, nor affect the duties and liabilities of the mortgagor as a partner; nor does it limit his authority as a partner to contract debts in carrying on the business, and to pay debts so contracted: it only confers on the mortgagee the right to the exclusive possession of the crop, and the exclusive power to dispose of it, and creates a lien on the mortgagor's interest in it as security for the mortgage debt.—*Monroe v. Hamilton*, 226.
  8. *Registration of mortgage; effect as constructive notice.*—The registration of a conveyance operates as constructive notice only when the statute authorizes its registration, and only to the extent of those provisions which are within the registration statutes. Hence, the registration of a mortgage, by which one partner conveys to his co-partner his entire interest in the partnership property as security for a



MORTGAGE—*Continued.*

debt, while it would operate as constructive notice, as against subsequent creditors and purchasers, of the lien created on the mortgagor's interest in the property, would not have that effect so far as it imposed any restraint or limitation on the authority of the mortgagor as a partner.—*Ib.* 226.

9. *Subrogation of creditor to rights of surety under mortgage given by principal debtor.*—When a debtor executes a mortgage, or deed of trust, for the declared purpose of securing his accommodation indorsers; authorizing the trustee to sell the lands, if he "should make default in paying said debt at maturity, and with the proceeds pay said bill of exchange," &c.; the deed enures to the benefit of the creditor, although it was executed without his knowledge: his acceptance of its provisions will be presumed, and he may enforce it against a purchaser with notice.—*McMullen's Adm'r v. Neal*, 552.
10. *Same; entering satisfaction of mortgage; when purchaser is chargeable with notice.*—When a mortgage, or deed of trust, is executed by a debtor with the declared purpose of securing his sureties, but in terms which make it enure to the benefit of his creditor, and it is duly recorded; the sureties can not, while the debt remains unpaid, impair the rights of the creditor, by entering satisfaction, or directing the trustee to enter satisfaction, on the record of the deed; and a purchaser from the debtor, after such entry of satisfaction, is chargeable with notice of the creditor's rights under the deed.—*Ib.* 552.
11. *Conflicting liens of partner and individual mortgagee or creditor.*—When the partnership name is used, with the consent of both partners, in borrowing money for the individual accommodation of one, who executes to the other a mortgage on his interest in the partnership property as security, and the latter pays the debt, his lien as a partner on the partnership property, for the sum so paid, is not dependent on the mortgage or its registration, and is superior to the lien of a prior unrecorded mortgage, of which he had no notice, but which was recorded before his, and was given for the individual debt of his co-partner.—*Warren v. Taylor*, 218.
12. *Cancellation of mortgage, on ground of fraud.*—If a creditor procures the execution by his debtor of a mortgage for past advances, by promising to make additional advances during the current year, the breach of this agreement on his part, although it might support an action at law, or a plea of set-off to the extent of the injury actually sustained, will not support a bill in equity for the cancellation of the mortgage on the ground of fraud.—*Johnson v. Murphy, Agnew & Co.*, 288.
13. *Homestead exemption; claim to proceeds of sale of, as between two mortgagees.*  
Under a bill in equity to settle the relative priority of two mortgages, and to have them foreclosed by a sale of the mortgaged property, which was the town residence of the mortgagor, and brought \$7,000 at the register's sale; the second mortgagee can not claim \$2,000 of the proceeds, on the ground that his mortgage, which was signed by the mortgagor and his wife jointly, was a valid alienation of the homestead, and the first was not.—*Marlowe & Wife v. Benagh*, 323.
14. *Sale of lands under execution against mortgagor; title of purchaser.*—When a mortgage reserves no right of possession in the mortgagor, or the law-day has passed, nothing but an equity of redemption remains in the mortgagor, and a purchaser under execution against him does not acquire such title as will sustain an ejectment; but, where the mortgage reserves to the mortgagor the possession and enjoyment of the property, with the right to use and rent it, until default shall be made in the payment of the secured bonds, extending through several years, this is a clear legal right, which is subject to levy and sale under execution against him; and a purchaser at the sale would acquire a title on which he might recover, in ejectment, against any one who does not show a paramount title.—*Bernstein v. Humes*, 582.
15. *Same; foreclosure of mortgage by sale under power.*—By statute (Code of 1876, § 3209), an execution may be levied on an equity of redemption

MORTGAGE—*Continued.*

in mortgaged lands; but, if the mortgage is foreclosed by a sale under the power, after the levy, but before the sale under the execution, the equity of redemption is cut off, and the purchaser at the subsequent execution sale acquires nothing.—*Shaw & Cox v. Lindsey*, 344.

MUNICIPAL CORPORATIONS. See CORPORATIONS.

MURDER. See CRIMINAL LAW, 43–52.

NEGLIGENCE. See DAMAGES.

NEW TRIAL. See REHEARING AT LAW.

## NOTARY PUBLIC.

1. *Notarial seal to protest.*—In this case, “looking at the original protest, seventeen years after it was made, and finding upon it a distinct circular outline impression of a seal, with an indented inner edge, or rim, and within this a number of stars in a circular row, and between them and the edge the legend, “*Notary Public, New Orleans, La.*,”—this, with the signatures,” the court holds, “is sufficient to establish the authenticity of the protest, in the absence of all evidence to create any suspicion of its genuineness.”—*Bradley v. Northern Bank of Alabama*, 252.
2. *Notary's certificate of presentment, demand, non-payment, and notice.*—The statute which makes a notary's certificate “of the presentment for acceptance, or demand of payment, or protest for non-acceptance or non-payment, of any instrument governed by the commercial law,” etc., “evidence of the facts contained in such certificate” (Rev. Code, § 1089; Code of 1876, §1336), although improperly placed in the chapter which relates to the appointment, etc., of notaries public in this State, equally applies to the certificates of foreign notaries, when offered in evidence in the courts of Alabama.—*Ib.* 252.

OFFICIAL BONDS. See BONDS.

## OVERRULED CASES.

1. *Blum v. Jones*, 51 Ala. 149, so far as inconsistent with *Thompson v. Merriam*, 15 Ala. 166, overruled by *Westmoreland & Trousdale v. Foster*, 449.
2. *Dugger v. Tayloe*, 46 Ala. 320, overruled by *Dugger v. Tayloe*, 504.
3. *Government St. Railroad v. Hanlon*, 53 Ala. 70, corrected by *Tanner's Executor v. Louisville & Nashville Railroad Co.*, 621.
4. *Murphy v. The State*, 54 Ala. 178, overruled by *Atkins v. The State*, 45.
5. *Northcot v. The State*, 43 Ala. 330, declared changed by statute, *Daniels v. The State*, 56.
6. *The State v. McAllister*, 105, changed by statute, Code of 1876, § 416.

## PARTITION.

1. *In Probate Court; jurisdiction of court; presumption in favor of decree.*—Although the Probate Court, in the matter of the partition of property, real or personal, between joint owners or tenants in common (Code of 1876, §§ 3497–3507), is a court of special and limited jurisdiction; yet, when its jurisdiction is apparent on the face of its proceedings, all reasonable intendments are made in favor of their regularity, as of courts of general jurisdiction.—*Stimpson v. Malone & Foote*, 338.
2. *Same; where parties own unequal interests.*—The fact that the parties own unequal interests in the property, so that partition by lot is impracticable, does not take away the jurisdiction of the court.—*Ib.* 338.
3. *Same; objections to commissioners' report.*—Objections to the commissioners' report are not available on error, unless made in the primary court, and reserved by bill of exceptions.—*Ib.* 338.

PARTITION—*Continued.*

4. *Partition of lands in equity.*—A court of equity will entertain a bill for the partition of lands, at the suit of one joint tenant, or tenant in common, who shows a clear title to an undivided interest therein.—*Arnnett v. Bailey*, 435.

## PARTNERSHIP.

1. *Partner's lien on partnership property.*—On the settlement of partnership accounts, each partner has a lien on the partnership effects, not only for the payment of partnership debts, but also for the payment of any balance due to him from his co-partner on a proper accounting between them.—*Warren v. Taylor*, 218.
2. *What are partnership debts.*—A bill of exchange drawn in the name of the partnership, with the knowledge and consent of both partners, is a partnership debt, though used, and intended to be used, in borrowing money for one of the partners individually; and even if the firm name was signed by the partner for whose accommodation the bill was drawn, without the knowledge or consent of his co-partner, but the lender had no knowledge of the intended use to which the money was to be applied, "we are not prepared to say the debt would not be a partnership liability."—*Id.* 218.
3. *Conflicting liens of partner and individual mortgagee or creditor.*—When the partnership name is used, with the consent of both partners, in borrowing money for the individual accommodation of one, who executes to the other a mortgage on his interest in the partnership property as security, and the latter pays the debt, his lien as a partner on the partnership property, for the sum so paid, is not dependent on the mortgage or its registration, and is superior to the lien of a prior unrecorded mortgage, of which he had no notice, but which was recorded before his, and was given for the individual debt of his co-partner.—*Id.* 218.
4. *Assignment by partner, of interest in partnership property.*—An assignment by one partner, of all his interest in the partnership property, to a stranger, necessarily operates a dissolution of the partnership; but, when such assignment is made to his co-partner, it does not have that effect, unless its terms show that the parties contemplated and intended his entire withdrawal from the partnership, and the termination of his duties, liabilities, and authority as a partner between themselves.—*Monroe v. Hamilton*, 226.
5. *Mortgage between partners, of interest in partnership property.*—Where two persons are cultivating a crop as equal partners, and one executes to the other a mortgage on his entire interest, as security for an individual debt which the mortgagee has become liable to pay; and the mortgage contains a stipulation, that, since the crop will be gathered before the maturity of the debt, the mortgagee shall take possession of it, and dispose of it for the mutual benefit of the parties; and that the net profits, after settlement of the partnership dealings, shall be divided into two equal parts, one of which shall belong to the mortgagee absolutely, and the other shall be held by him in trust for the mortgagor, to be applied to the payment of the secured debt, and the balance paid over to the mortgagor; such mortgage does not operate a dissolution of the partnership, nor affect the duties and liabilities of the mortgagor as a partner; nor does it limit his authority as a partner to contract debts in carrying on the business, and to pay debts so contracted: it only confers on the mortgagee the right to the exclusive possession of the crop, and the exclusive power to dispose of it, and creates a lien on the mortgagor's interest in it as security for the mortgage debt.—*Id.* 226.
6. *Action by partnership; statement of partners' names.*—In an action by a partnership, the record must show the individual names of the several partners; although the statute (Code of 1876, § 3038) dispenses with the necessity of proving them, unless denied by plea verified by affidavit, and also (§ 2904) authorizes a suit against a partnership by its firm name.—*Moore & McGee v. Burns & Company*, 269.



## PARTNERSHIP—Continued.

7. *Real estate belonging to partnership.*—When the title to real estate is conveyed to a partnership, although a court of equity will sometimes treat it as partnership assets, yet, at law, the several partners hold it as tenants in common.—*Wood v. Montgomery*, 500.

## PAYMENT.

1. *Plea of payment, and replication thereto.*—In an action on a promissory note, by an indorsee against the maker, a general plea of payment, in the form given in the Code (Form No. 27, p. 706), must be understood to aver a payment which was valid and operative as against the plaintiff, and a general replication to it imposes on the defendant the burden of proving such a payment; but a special replication, which only avers that, before the payment was made, and before the maturity of the note, the plaintiff had become the holder for valuable consideration, is no answer to the plea, and is demurrable.—*Barbour & Son v. Washington F. & M. Insurance Co.*, 433.
2. *Payment of note; when valid against assignee.*—A payment of a promissory note to the payee, made before maturity, but after the note has been assigned for valuable consideration, or made after maturity, but with notice or knowledge of the assignment, is not available as against the assignee.—*Ib.* 433.
3. *Payment; what evidence admissible under plea of, and what constitutes.*—In an action by the wife, suing alone, for money had and received, belonging to the corpus of her statutory separate estate, the defendant may show, under the plea of payment, that the money was collected by him on a check, or draft, which the husband had delivered to him on account of an indebtedness for "articles of comfort and support of the household" already supplied and furnished by him, and which was received and used by him as so much money: if the check was delivered and received as a payment, or if it was delivered pursuant to an agreement, made when the debt was contracted, that payment should be so made, it would constitute a payment.—*Castleman v. Jeffries*, 380.
4. *Payment in Confederate currency, or in notes on third person.*—A payment in Confederate currency, during the late war, on a debt payable in good money, can not be sealed at the instance of the creditor, and reduced to its real value at the time; and on the same principle, a payment in notes on third persons, made and received at their face value as a partial payment only, can not be treated, at the will of the debtor, as a payment in full, because the debt was payable in Confederate money, and the notes were worth in gold more than the entire debt in that currency.—*Hill's Adm'r v. Erwin & Jones*, 341.
5. *Same; computation of partial payments.*—In an action on a note given for the purchase of property during the late war, with the understanding that it might be paid in Confederate currency, a partial payment having been made in that currency, the ratio between the nominal amount of the note, with interest to the time of the partial payment, and the unpaid balance, is also the ratio between the actual value of the property at the time of the purchase, with interest, and the balance still due in good money; to which balance, thus ascertained, interest must be added.—*Ib.* 341.
6. *Payment of note to executor, in Confederate treasury-notes.*—An executor, or administrator, has power to transfer a promissory note, assets of the estate, in payment of a debt due from the decedent; and it was also within his power, having sold property of the estate during the late war, to receive payment of the purchaser's note, before its maturity, in treasury-notes of the Confederate States.—*Shelton v. Carpenter*, 202.

## PLEADING AND PRACTICE

1. *Action by foreign corporation; amendment of complaint in averment of plaintiff's corporate character.*—In an action by a foreign corporation, if the complaint does not aver the plaintiff's corporate character, the cause

PLEADING AND PRACTICE—*Continued.*

- should not be struck from the docket on that account, but an amendment should be allowed to supply the defect.—*Southern Life Insurance Co. v. Roberts*, 431.
2. *Action by partnership; statement of partners' names.*—In an action by a partnership, the record must show the individual names of the several partners, although the statute (Code of 1876, § 3038) dispenses with the necessity of proving them, unless denied by plea verified by affidavit, and also (§ 2094) authorizes a suit against a partnership by its firm name.—*Moore & McGee v. Burns & Co.*, 269.
  3. *Action on judgment; sufficiency of complaint.*—In an action on a domestic judgment, it is sufficient to aver the rendition of the judgment, the court by which it was rendered, the date, names of parties, and amount; and it is not necessary to aver that the court had jurisdiction, nor that the judgment remains of full force, unreversed, and unsatisfied.—*Masterson v. Matthews*, 260.
  4. *Presumption as to pleadings.*—When the record recites that the court sustained a demurrer to the whole complaint, for a misjoinder of counts, and that the defendant then demurred to the second count, and, his demurrer being overruled, he then filed pleas, on which issue was joined; this court will presume that, after sustaining the demurrer to the whole complaint, the court gave the plaintiff leave to amend, and that he amended his complaint by striking out the first count.—*Ib.* 260.
  5. *Action on bond; non-joinder of obligors.*—Under the present statute (Code of 1876, § 2904), as under the act of 1818 (Clay's Digest, 323, § 61), joint bonds are made joint and several; and the plaintiff may, at his election, sue one, several, or all of the makers: in an action against one or more, the non-joinder of the others is not pleadable in abatement.—*McKee v. Griffin*, 427.
  6. *Rulings on demurrer; when revisable.*—Rulings on demurrer, not shown by the judgment, though copied in the transcript by the clerk, are not revisable on error.—*Chapman v. Holding*, 522.
  7. *Plea of payment, and replication thereto.*—In an action on a promissory note, by an indorsee against the maker, a general plea of payment, in the form given in the Code (Form No. 27, p. 706), must be understood to aver a payment which was valid and operative as against the plaintiff, and a general replication to it imposes on the defendant the burden of proving such a payment; but a special replication, which only avers that, before the payment was made, and before the maturity of the note, the plaintiff had become the holder for valuable consideration, is no answer to the plea, and is demurrable.—*Barbour & Son v. Wash. F. & M. Insurance Co.*, 433.
  8. *Payment; what evidence admissible under plea of, and what constitutes.*—In an action by the wife, suing alone, for money had and received, belonging to the corpus of her statutory separate estate, the defendant may show, under the plea of payment, that the money was collected by him on a check, or draft, which the husband had delivered to him on account of an indebtedness for "articles of comfort and support of the household" already supplied and furnished by him, and which was received and used by him as so much money: if the check was delivered and received as a payment, or if it was delivered pursuant to an agreement, made when the debt was contracted, that payment should be so made, it would constitute a payment.—*Castleman v. Jeffries*, 380.
  9. *Set-off; requisites of plea of.*—A plea of set-off requires the same averments which would be necessary to make a good complaint if the claim were sued on; but it is not necessary that facts averred in the complaint should be repeated in the plea.—*Ib.* 380.
  10. *Defects in process.*—Defects in the form of process, which are amendable, can only be taken by plea in abatement, and are not available on error or appeal.—*Peebles v. Weir*, 413.
  11. *Residence and freehold in another county; form of plea.*—A plea averring the defendant's residence and freehold in another county, which is matter of abatement only, would be demurrable at common law, if i

PLEADING AND PRACTICE—*Continued.*

form a plea in bar; but, under the statute (Code of 1876, §§ 2987, 2990), being determined by the subject-matter, it is a good plea in abatement. *Day v. Huckabee*, 425.

12. *Judgment on demurrer to plea in abatement.*—On overruling a demurrer to a plea in abatement, the plaintiff may, under our practice, plead over, if he elects to do so; but the record must affirmatively show that he claimed the privilege, or he cannot complain that he was deprived of it.—*Ib.* 425.
13. *Motion in arrest of judgment, or for judgment non obstante veredicto; when not grantable.*—When there is a general verdict for the plaintiff, and no repugnance between it and the plaintiff's pleadings, the defendant can not move in arrest of judgment, nor have judgment entered *non obstante veredicto*, on the ground that some of the plaintiff's documentary evidence shows that the verdict finds inconsistent facts: this would be, at most, only matter to be considered on motion for a new trial.—*Chapman v. Holding*, 522.

## PROHIBITION.

1. *When prohibition lies.*—A prohibition will be awarded by this court, to vacate and prevent the enforcement of a final decree in chancery which is a nullity, and from which, on account of the entire absence of adverse parties and interests, no appeal will lie.—*Ex parte Lyon*, 650.
2. *Same: when peremptory.*—On application to this court for a prohibition, the officer against whom it is asked being duly notified, and the whole cause being fully presented and argued on both sides, a peremptory writ will be awarded in the first instance, without a rule *nisi*.—*Ib.* 650.
3. *Costs.*—The costs of the application in this case were adjudged against the plaintiff in the decree ordered to be vacated, who was a special administrator, and who was left to pursue whatever remedy he might have against the estate in another proceeding.—*Ib.* 650.

## PUBLIC ROADS.

1. *Appointment of overseer; infancy as disqualification.*—The appointment of a person, who is at the time under twenty-one years of age, as an overseer of a public road (Code of 1876, § 1632), is not void: his minority is a personal exemption, which he may either claim or waive.—*Allison v. The State*, 54.
2. *Excuse or resignation of overseer.*—When a person has been regularly appointed as an overseer of a public road, and has been notified of his appointment, he can only relieve himself of the duties and responsibilities of the position, by rendering his excuse for not accepting, or for resigning after acceptance, in the manner prescribed by the statute (Code of 1876, § 1644).—*Ib.* 54.

## RAILROADS.

1. *Care and diligence required of railroad company.*—In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence—that degree of diligence which very careful and prudent men exercise in the conduct of their own affairs; and this requires that they shall employ very careful and prudent men, and that the persons employed by them shall exercise such care and diligence as very careful and prudent men exercise in the conduct of their own private interests and important enterprises.—*Tanner's Executor v. L. & N. Railroad Co.*, 624.
2. *Contributory negligence.*—The doctrine of contributory negligence, as a defense to an action for damages on account of injuries caused by a careless or tortious act, has been materially modified, in its application to actions against railroad companies: although the plaintiff may have been at fault in the first instance, in getting on the railroad track, and thus placing himself in a position of peril, yet, if he makes all proper



RAILROADS—*Continued.*

- efforts to escape when the danger becomes apparent, and the servants of the railroad company fail to use all the proper means in their power by which the danger might be avoided, the railroad company is responsible for the injury, and the original contributory negligence is no defense to the action.—*Ib.* 621.
3. *Same.*—To avoid the defense of contributory negligence, it is not necessary that the wrongful act of the defendant, or its agents and servants, should be "wanton and intentional," as erroneously stated in the case of *Government Street Railroad Co. v. Hanlon*, 53 Ala. 70: if the injury done be wanton, reckless, or intentional, that defense is overcome. *Ib.* 621.
  4. *Same.*—When a person of adult years is seen on a railroad track, in advance of an approaching train, and shows by his actions that he is aware of its approach, and is using the proper efforts to get out of its way, the person in charge of the train is not required to stop it, nor, ordinarily, even to check its speed; but, if the person be on horseback, on a high embankment, or in a deep cut, from which he probably can not escape in time, or be suddenly thrown from his horse, and can not escape, it is the duty of the engineer promptly to use all means in his power to avoid injury, and the company is liable if he fails to do so. *Ib.* 621.
  5. *Admissibility of declarations as part of res gestæ.*—The declarations of the servants of the railroad company, while returning to town on the train with the dead body of the deceased, are not admissible evidence against the company, as a part of the *res gestæ* connected with the killing. *Ib.* 621.
  6. *Relevancy of evidence, on question of negligence.*—In an action against a railroad company, to recover damages for killing plaintiff's testator while riding on the track, on horseback, the defendant cannot be allowed to prove "that there was danger to employees on the train in running over stock," nor that other persons had been notified not to travel on the railroad track.—*Ib.* 621.
  7. *What witness may state.*—The engineer in charge of the train at the time the accident happened, can not be allowed to testify that he used "all the means he had to stop the train," but should state what means he did use.—*Ib.* 621.
  8. *Same.*—So, he cannot be asked, "whether the ground and bearing of the road-bed were such as would have permitted the deceased to escape injury by the locomotive and cars, but for his own conduct," &c.—*Ib.* 621.

## REDEMPTION OF REAL ESTATE.

1. *Who may redeem.*—The plaintiff in the judgment, under whose execution the land was sold, is embraced in the general words of the present statute, "all judgment creditors of the debtor" (Code of 1876, § 2881), and may redeem from the purchaser at execution sale, if his judgment was not obtained by confession, and was not satisfied by the sale. *Posey v. Pressley*, 243.
2. *Permanent valuable improvements.*—When permanent valuable improvements have been erected on the land, by the purchaser at execution sale, or other person holding possession under him, the creditor proposing to redeem must pay, or offer to pay, their value, as a part of the "lawful charges" (§§ 2881, 2887); but, if he makes a general offer to redeem, and his right to redeem is denied, he is excused from making any particular inquiry as to a claim for improvements.—*Ib.* 243.
3. *Outstanding or superior title acquired by purchaser.*—If the purchaser at execution sale, or person holding possession under him, afterwards acquires an outstanding superior title, he can not refuse an offer of redemption on that account, nor set up that title in defense of an action of unlawful detainer at the suit of the person offering to redeem: he must surrender the possession, and convey the interest which he ac-

REDEMPTION OF REAL ESTATE—*Continued*

quired by the sheriff's deed, and then assert his superior title by proper action.—*Ib.* 243.

4. *Limitation of action.*—Three years is the statutory limitation of an action for the unlawful detainer of lands (Code of 1876, § 3705); yet, when the action is brought by a judgment creditor, or other person having a statutory right to redeem, whose offer to redeem has been refused, quiet possession for three years after the sale is not necessarily a bar, since the statute does not begin to run until the accrual of the plaintiff's cause of action by the tender and refusal.—*Ib.* 243.

## REGISTER IN CHANCERY.

1. *Official bond of register in chancery; liability of sureties for moneys collected by him as custodian, or special receiver.*—Under our practice and laws, the duties which, in England, pertained to masters and registrars in chancery, are blended, and devolved on the register, and he is the proper person to be appointed the custodian, or special receiver, of a fund or choses in action in court; and for moneys received by him in that capacity, and not accounted for, the sureties on his official bond as register are responsible.—*Coleman v. Ormond*, 328.

## REHEARING AT LAW.

1. *Filing petition.*—A petition for a rehearing after final judgment at law, under the statute (Code of 1876, §§ 3161-66), must be presented to the judge in person, and a filing with the clerk of the court is not equivalent to such presentation.—*Ex parte Johnson & Seals*, 429.
2. *What petition must show.*—On application for a rehearing, or new trial, after final judgment at law, on the ground of surprise, accident, mistake, or fraud (Code of 1876, §§ 3161-66), the petitioner must show, not only that he had a good cause of action or defense, but that he can substantiate it on another trial, and that his failure to substantiate it on the former trial was without fault or negligence on his part; and these rules are applied with more strictness, where, as in this case, the cause had been pending for five or six years.—*Ex parte Wallace*, 267.

## REVISED CODE. See CODE OF ALABAMA (1876).

## SEAL.

1. *What constitutes.*—Although wax is better adapted than any other substance to receive and retain the impression of a seal, and was in ancient times used almost exclusively for that purpose, yet the seal may be stamped or impressed on the paper itself.—*Bradley v. Northern Bank of Alabama*, 252.
2. *Notary's seal to protest.*—In this case, "looking at the original protest, seventeen years after it was made, and finding upon it a distinct circular outline impression of a seal, with an indented inner edge or rim, and within this a number of stars in a circular row, and between them and the edge the legend, 'Notary Public, New Orleans, La.'—this, with the signatures," the court holds, "is sufficient to establish the authenticity of the protest, in the absence of all evidence to create any suspicion of its genuineness."—*Ib.* 252.

## SET-OFF.

1. *Requisites of plea.*—A plea of set-off requires the same averments which would be necessary to make a good complaint if the claim were sued on; but it is not necessary that the facts averred in the complaint should be repeated in the plea.—*Castleman v. Jeffries*, 380.

## STATUTES.

1. *Common law and English statutes; how far of force here.*—The ancient common law of England, in its entirety, never prevailed here, but only such parts of it as were not inconsistent with our institutions and public policy, as deduced from statutory and constitutional provisions; and

STATUTES—*Continued.*

- English statutes, enacted prior to the immigration of our ancestors to this country, prevailed to the same extent as a part of that common law. *Nelson v. McCrary*, 301.
2. *Foreign statutes.*—The courts of Alabama can not judicially know how far the common law of England, by which lands could not be subjected by legal process to the payment of debts, has been changed by statute in Mississippi.—*Lide v. Parker's Executor*, 165.
  3. *Foreign laws ; proof of, by printed volume.*—A printed volume, whose title-page is as follows : "Acts passed by the second Legislature of the State of Louisiana, at its second session, held and begun at the town of Baton Rouge, on the 15th day of January, 1855. Published by authority. New Orleans: Printed by *Amile La Sere*, State Printer,"—shows on its face that it was printed by proper authority (Code of 1876, § 3045), and is, therefore, evidence of its contents without further proof.—*Bradley v. Northern Bank of Alabama*, 252.
  4. *Re-enactment of statute judicially construed.*—The substantial re-enactment, in the Code of 1852, of a statute which had been judicially construed by this court, is a legislative adoption of that judicial construction; and the mere omission of special words found in the former statute, and which are embraced in the general words used in the Code, will not be held to imply a change in the statute.—*Posey v. Pressley*, 243.
  5. *Repealing statutes.*—A clause in a statute, repealing "all laws and parts of laws contravening this act," is only a legislative declaration of its necessary effect, and does not add to its repealing force; but, when a statute is a revision of existing statutes on the same subject, and shows on its face that it was intended to operate as the only law on the subject, it necessarily repeals all existing statutes, without express words of repeal.—*Ogbourne v. Ogbourne's Adm'r*, 616.

## SUBROGATION. See SURETIES.

## SURETIES.

1. *Subrogation of creditor to rights of surety under mortgage given by principal debtor.*—When a debtor executes a mortgage, or deed of trust, for the declared purpose of securing his accommodation indorsers; authorizing the trustee to sell the lands, if he "should make default in paying said debt at maturity, and with the proceeds pay said bill of exchange," &c.; the deed enures to the benefit of the creditor, although it was executed without his knowledge: his acceptance of its provisions will be presumed, and he may enforce it against a purchaser with notice.—*McMullen v. Neal's Adm'r*, 552.
2. *Same; entering satisfaction of mortgage; when purchaser is chargeable with notice.*—When a mortgage, or deed of trust, is executed by a debtor with the declared purpose of securing his sureties, but in terms which make it enure to the benefit of his creditor, and it is duly recorded; the sureties can not, while the debt remains unpaid, impair the rights of the creditor, by entering satisfaction, or directing the trustee to enter satisfaction, on the record of the deed; and a purchaser from the debtor, after such entry of satisfaction, is chargeable with notice of the creditor's rights under the deed.—*Ib.* 552.

## TAXES.

1. *Garnishment at suit of tax collector.*—A summary proceeding by garnishment at the suit of a tax collector, under the revenue law of 1868 (§ 53), could only be instituted before a justice of the peace; and there is no authority for extending the provisions of the law to the Circuit Court, in cases which exceed the jurisdiction of a justice. (Changed by statute, Code of 1876, § 416).—*The State v. McAllister*, 105.



## TENANTS IN COMMON.

1. *Action for use and occupation.*—Where there has not been a joint letting of lands held by tenants in common, each tenant may maintain a separate action for his proportionate part of the amount due for the use and occupation.—*Wood v. Montgomery*, 500.

## TIME.

1. *Computation of time, on bill payable ninety days after date.*—A bill of exchange, dated the 13th October, and payable ninety days after date, falls due on the 11th January next, and is properly protested on the 14th January.—*Bradley v. Northern Bank of Alabama*, 252.
2. *Same, under statute of limitations.*—The late civil war prevailed, as this court judicially knows, from 1861 to 1865; and the statutes of limitation were suspended from the 11th January, 1861, to the 21st September, 1865: consequently, the statute of limitations of ten years can not bar an action commenced in July, 1871, unless the adverse holding commenced fourteen years, eight months, and ten days before the writ was sued out.—*Bernstein v. Humes*, 582.

## TRESPASS. See CRIMINAL LAW, 62-3.

## TRIAL OF RIGHT OF PROPERTY.

1. *What defects are not available to claimant.*—On the trial of a statutory claim suit, the claimant can not take advantage of defects in the attachment, or other process, which do not render it absolutely void.—*Ellis v. Martin*, 394.

## TRUSTS, AND TRUSTEES.

1. *Resignation of trustee; withdrawal of, and subsequent sale.*—A trustee with power of sale, appointed by a deed given to secure the payment of a debt, having tendered his resignation to the register in chancery, as provided by law (Code of 1876, § 3727), may nevertheless withdraw it, at any time before final action has been taken on it by the register, and execute the power of sale conferred by the deed.—*Dillard & Wife v. Winn*, 285.
2. *When cestui que trust can not come into equity.*—When the legal title to lands is vested in a trustee, the *cestui que trust* can not maintain a bill in equity against an adverse holder, to recover possession, without an averment that the trustee refuses to sue at law.—*Arnelt v. Bailey*, 435.
3. *Duty and liability of trustee.*—Infallibility is not exacted of trustees: they form their best judgment in the light of existing facts, and, if they act in good faith, they are not responsible for results which could not have been foreseen by ordinary vigilance and prudence.—*Lyon v. Foscue*, 468.
4. *Same.*—To relieve a trustee from liability for the failure to collect moneys which he might have collected, he must show something more than a simple mistake in the calculation of interest.—*Ib.* 468.
5. *Compensation of trustee.*—On the facts of this case, the trustee was held entitled, in addition to commissions on his annual receipts and disbursements to the tenant for life, to reasonable compensation for his services, trouble, and risk in collecting, investing, and managing the trust funds during the late civil war, when the responsibilities of his office were greatly increased by the anomalous condition of affairs, of which the court takes judicial notice.—*Ib.* 468.
6. *Solicitor's fees, and costs.*—This being the settlement of a trust, under a bill filed by the beneficiaries against the trustee, the litigation being protracted, and some of the contested items of account being decided against each party, the solicitor's fees and the costs were equally divided among the trustee, the beneficiary of the life estate, and the remaindermen, one third to be paid by each.—*Ib.* 468.
7. *Private legislative act, appointing trustee to execute trust created by deed, in which infants are beneficiaries.*—A private statute, appointing a trustee to

TRUSTS, AND TRUSTEES—*Continued.*

execute a trust created by deed, in which infants are interested as beneficiaries, and authorizing him to settle with the acting trustee and to execute all the powers conferred by the deed on the original trustee (enacted at the instance of the acting trustee and most of the adult beneficiaries), is not an invasion of judicial power by the legislature, but a legitimate exercise of their own appropriate functions; and its validity is not affected by the fact that, at the time of its enactment, the acting trustee had filed his accounts for settlement in the court by which he was appointed, and asked to be discharged, and proceedings under his petition were still pending.—*Tindal v. Drake*, 170.

## UNLAWFUL DETAINER.

1. *Limitation of action.*—Three years is the statutory limitation for the unlawful detainer of lands (Code of 1876, § 3705); yet, when the action is brought by a judgment creditor, or other person having a statutory right to redeem, whose offer to redeem has been refused, quiet possession for three years after the sale is not necessarily a bar, since the statute does not begin to run until the accrual of the plaintiff's cause of action by the tender and refusal.—*Posey v. Pressley*, 243.

VAGRANCY. See CRIMINAL LAW, 71-2.

VARIANCE. See CRIMINAL LAW, 40-42.

## VENDOR AND PURCHASER.

1. *Vendor's lien; how affected by statute of limitations.*—A vendor's equitable lien for the unpaid purchase-money of land is not lost or destroyed because the statute of limitations has barred an action at law on the notes for the purchase-money; and this principle applies where he has conveyed the land by absolute deed, taking no mortgage or other security, as well as where he has retained the title, and executed only a bond for title. (MANNING, J., *dissenting*).—*Bizzell v. Nix*, 281.
2. *Vendor's lien, and against whom asserted.*—The principle must be regarded as settled in Alabama, that, in the absence of an agreement to the contrary, the vendor retains a lien on the land for the unpaid purchase-money, although he has conveyed by absolute deed, reciting therein that the purchase-money has been paid; which lien will be enforced against all persons, except a *bona fide* purchaser without notice.—*Bankhead v. Owen*, 457.
3. *Same; when passes by transfer of note.*—The transfer of a promissory note, given for the purchase-money of land, by delivery merely, without recourse on the vendor, or liability on his part, does not carry with it the right to enforce the vendor's lien on the land.—*Ib.* 457.
4. *Sale of land by administrator, under probate decree; vendor's lien as against sub-purchaser.*—A sub-purchaser of lands sold by an administrator under a probate decree, who contracts with the original purchaser for a portion of the lands, is not a debtor of the administrator, nor of the estate: if the administrator or heirs attempt to subject the lands so bought by him to the payment of the original purchase-money, an equity at once arises in his favor to have the other lands first subjected; and if the heirs have released the original purchaser from all liability on account of his purchase, with a reservation of the right to assert against the sub-purchaser their title to the lands bought by him, they can not assert against him a vendor's lien for any portion of the original purchase-money.—*Dugger v. Tugloe*, 504.
5. *Same; decree ordering conveyance to purchaser.*—When lands are sold by an administrator, under a probate decree, for equitable division, the title of the heirs or devisees is not divested, until the purchase-money has been paid, and a conveyance has been executed to the purchaser under the decree of the court, which decree may be rendered on the applica-

VENDOR AND PURCHASER—*Continued.*

- tion either of the administrator or of the purchaser (Code of 1876, § 2468); and when the application is made by the purchaser, although notice to the heirs is not necessary, notice to the administrator is indispensable; and a decree rendered, without notice to him, is absolutely void, at law as well as in equity. (*Overruling Dwyer v. Taylor*, 46 Ala. 320.)—*Id.* 504.
6. *Waiver of vendor's lien.*—Where the purchaser died, not having paid the purchase-money, and the land was sold by his administrator under a decree of the Probate Court; and the vendor afterwards accepted from the purchaser at that sale, in satisfaction of his claim against the land, a draft on a third person, surrendered the note given for the purchase-money, and collected a part of the money on the draft in Confederate currency; *held*, that these facts proved a waiver and relinquishment of the vendor's lien.—*Thames v. Caldwell*, 644.
  7. *Sale of lands under judgment or decree afterwards reversed.*—A sale of lands, under a judgment or decree which is afterwards reversed on error, is not thereby avoided, unless the judgment or decree is void; and an averment, in a bill asking relief against a purchase at such sale, that the decree was "reversed and annulled" by this court on appeal, is not equivalent to an averment that it was void.—*Lesslie v. Richardson*, 563.

## VERDICT.

1. *For plaintiff in ejectment.*—In ejectment, or a statutory action in the nature of ejectment, issue being joined on the plea of not guilty, without any disclaimer as to a part of the premises, a verdict finding the issues for the plaintiff is a verdict for the entire premises, and is sufficient: it is only when the verdict is for less than the entire premises sued for, that it is necessary to describe the part found for plaintiff.—*Chapman v. Holding*, 522.
2. *Blank forms of verdict for jury.*—The practice has long prevailed of instructing the jury orally, as to the proper form of verdict, and it is unobjectionable; nor is it erroneous to give them blank forms in writing, to be used according to their finding on the facts.—*Id.* 522.
3. *Verdict against charge of court.*—That the jury, by their verdict, have disregarded the charge of the court, is not error, but is good matter for a motion for a new trial; and the ruling of the primary court on such motion is not revisable on error.—*Id.* 522.
4. *Motion in arrest of judgment, or for judgment non obstante veredicto; when not grantable.*—When there is a general verdict for the plaintiff, and no repugnance between it and the plaintiff's pleadings, the defendant can not move in arrest of judgment, nor have judgment entered *non obstante veredicto*, on the ground that some of the plaintiff's documentary evidence shows that the verdict finds inconsistent facts: this would be, at most, only matter to be considered on motion for a new trial.—*Id.* 522.
5. *Verdict of guilty, under indictment containing good and bad counts.*—When an indictment contains several counts, one of which is good, and there is no demurrer to the bad counts, a general verdict of guilty will be referred to the good count, and the conviction will be sustained.—*Taney v. The State*, 97; *Glenn v. The State*, 104.
6. *Personal presence of prisoner in court on return of verdict.*—In a case of felony, the prisoner has a right to be present in court when the jury return their verdict; which right is not waived by the failure of his counsel to object to the verdict being received in his absence, nor can it be waived by them. If the verdict is received in his absence, it is void; and the error can not be cured, after the jury have been discharged, by immediately reassembling the jurors, examining on oath those who had left the court-room, and again receiving the verdict in the presence of the prisoner.—*Cook v. The State*, 39.



## WITNESS.

1. *Privileged communications to attorney.*—When an attorney is employed to devise and consummate a plan, by which the husband may secure lands to the wife in payment of an admitted indebtedness, and is afterwards employed by the wife to file a bill for the specific performance of the executory contract agreed on, he can not testify as a witness, at the instance of a subsequent purchaser from the husband, against the objection of the husband and wife, that a mistake was made in the description of the lands conveyed.—*Blunt v. Strong*, 572.
2. *Leading questions to witness.*—To determine when a question is leading, and therefore not allowable in any particular case, no rule of universal application can be laid down, but each case must, to some extent, be determined by its peculiar facts and circumstances. All the authorities agree, that direct and leading questions may be propounded, when necessary to lead the mind and attention of the witness up to the particular subject upon which he is called to testify; but, when the witness is interested, or *prima facie* biased in favor of the party by whom he is called, any question is objectionable, as leading, which suggests to him the desired answer, or, embodying a material fact, admits of an answer by a simple negative or affirmative.—*Ib.* 572.
3. *General and indefinite interrogatories.*—An interrogatory to a witness, asking if the allegations in four specified paragraphs of the bill are not true, is leading, and is also objectionable for generality; and in answer to a general concluding interrogatory, asking him to state any other matter or thing within his knowledge, that may be of benefit to either of the parties to the cause, or material to the matters in controversy, the witness can only state matters which are germane or supplementary to his former answers.—*Ib.* 572.
4. *Cross-examination of witness.*—The servants of the railroad company, who were employed on the train at the time plaintiff's intestate was killed, having been examined as witnesses for the company, they may be questioned, on cross-examination, as to their statements and declarations relative to the accident, made a day or two after it happened; such questions are certainly permissible, as laying a predicate for proof of contradictory statements, even if they exceed the large latitude which is allowed in the cross-examination of witnesses.—*Tanner's Executor v. L. & N. Railroad Co.*, 621.
5. *What witness may state.*—The engineer in charge of the train at the time the accident happened, can not be allowed to testify that he used "all the means he had to stop the train," but should state what means he did use.—*Ib.* 621.
6. *Same.*—So, he cannot be asked, "whether the ground and bearing of the road-bed were such as would have permitted the deceased to escape injury by the locomotive and cars, but for his own conduct," &c. *Ib.* 621.
7. *Competency of husband, as witness for wife.*—The husband is a competent witness for the wife, where his testimony does not relate to any communication made between them, nor tend to violate the sacred confidence of the marital relation.—*Chapman v. Holding*, 522.
8. *Competency of prosecutor as witness.*—On a prosecution for trespass after warning (Code of 1876, §§ 4419-20), the prosecutor is a competent witness for the State, though entitled to the fine on conviction. (*Northcot v. The State*, 43 Ala. 330, asserting a different principle, declared overruled by statute.)—*Daniels v. The State*, 56.
9. *Same.*—On a prosecution for obtaining money or property by false pretenses, the person defrauded is a competent witness for the State. *Sandy v. The State*, 58.
10. *Competency of parties as witnesses in civil cases; exception as to actions by or against administrators, and statements and transactions by or with decedents.* Under the statute relating to the competency of parties as witnesses in civil cases (Code of 1876, § 3058), the exception which declares that, "in suits or proceedings by or against executors or administrators, neither party shall be entitled to testify against the other, as to any transaction

WITNESS—*Continued.*

with or statement by any deceased person whose estate is interested in the result of such suit," &c., applies to and excludes the distributees of the estate, who, though not nominally parties, are beneficially interested in the result of the suit.—*McCrory's Adm'r v. Rush's Adm'r*, 374.

11. *Same.*—When the estate of any deceased person is interested in the result of a suit, a party to the suit is not allowed to testify as to any transaction with or statement by the deceased (Code of 1876, § 3058); but the statute does not forbid any other person, not a party, to testify as to any such transaction or statement.—*Smith's Adm'r v. Bryant's Adm'r*, 235.
12. *Impeaching witness, by proof of contradictory statements.*—A witness may be impeached in a criminal case, by proof of contradictory statements made by him on an application by the prisoner for bail; although, when cross-examined as to such statements, he says "he does not remember whether he said so or not."—*Payne v. The State*, 80.
13. *Impeaching witness by proof of weak mind or memory.*—When a witness in a criminal case, testifying as to facts which occurred immediately before and after a homicide committed two years previously, admits that he can not "step off one hundred yards and count it—that he would forget how far he had gone before he counted a hundred"—and his testimony otherwise shows weakness of mind, there is no error in refusing to allow him to be asked, on cross-examination, as to his superstitious notions concerning the effects of certain roots: such evidence is too remote from the issue, and does not tend to show that he was not a good observer of facts, and faithful in narrating them; nor is it erroneous to refuse to let him be asked, "for the purpose of testing his recollection," whether he did not swear, on the prisoner's application for bail several months before, "that he was weak-witted." (MANNING, J., dissenting as to the latter proposition.)—*Allen v. The State*, 19.









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